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# The Rules Enabling Act of 1934

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## THE RULES ENABLING ACT OF 1934

STEPHEN B. BURBANK †

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This article is for my father.

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"It defies death."<sup>1</sup>

"Once legislation is eventually enacted, the antecedent period of travail is usually relegated to oblivion."<sup>2</sup>

## I. INTRODUCTION

This is a difficult time for those involved in making rules of procedure for the federal courts.<sup>3</sup> The long-enduring pattern of congressional acquiescence in Federal Rules was broken in response to the proposed Federal Rules of Evidence in 1973 and has not been reestablished.<sup>4</sup> Although proposed amendments to the Fed-

<sup>1</sup> S. REP. NO. 1174, 69th Cong., 1st Sess. 21 (1926) (minority views of Senator Walsh); S. REP. NO. 440, 70th Cong., 1st Sess. 2 (1928).

<sup>2</sup> Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 504 (1935). "But oblivion overtakes the past." Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1029 (1924).

<sup>3</sup> There are numerous terminological traps in the use of the words "rule" and "rulemaking." See, e.g., J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 155 n.2 (1977); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 697 n.31 (1974). This article will follow Professor Ely in using the unmodified words "Federal Rule" to mean "a Federal Rule of Civil Procedure or other Rule promulgated pursuant to the Rules Enabling Act for use in all federal district courts . . . ." *Id.*

The current version of the Enabling Act is contained in 28 U.S.C. § 2072 (1976), which provides:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

<sup>4</sup> E.g., Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 167-68 n.2 (1979); Wright, Book Review, 9 ST. MARY'S L.J. 652, 652-53 (1978). Within six years, postponing the effective date of proposed amendments to Federal Rules had become "not a novel procedure." 125 CONG. REC. H6376 (daily ed. July 23, 1979) (statement of Rep. Drinan).

eral Rules of Civil Procedure have become effective without congressional interference since two of our most distinguished proceduralists opined that federal rulemaking was "in serious trouble"<sup>5</sup> and "in very deep trouble,"<sup>6</sup> the event gives the rule-makers little cause for celebration. Some of the proposed amendments were the subject of a dissent by three members of the Supreme Court, not protesting, as often in the past, against over-reaching,<sup>7</sup> but against under-reaching.<sup>8</sup> Withal, the heads of a key congressional committee and sub-committee were moved to send letters, subsequently distributed to the entire federal judiciary, recording various understandings of, and continuing interest in, one of the amendments.<sup>9</sup> Moreover, the Civil Rules amendments

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<sup>5</sup> Wright, *supra* note 4, at 652.

<sup>6</sup> *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rule Making*, 79 F.R.D. 471, 491-92 (1978) (remarks of Professor Miller).

<sup>7</sup> See, e.g., 368 U.S. 1012 (1961) (statements of Black and Douglas, J.J.); 374 U.S. 865 (1963) (statement of Black and Douglas, J.J.); 383 U.S. 1032 (1966) (Black, J., dissenting); 383 U.S. 1089 (1966) (Douglas, J., dissenting in part); 409 U.S. 1132 (1972) (Douglas, J., dissenting).

<sup>8</sup> "I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms." 446 U.S. 997, 1000 (1980) (dissenting statement of Powell, J., joined by Stewart and Rehnquist, J.J.). Justice Powell's dissent is criticized in Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806 (1981). Professor Rosenberg has a different view. See Rosenberg, *Foreword*, 69 CAL. L. REV. 647, 648 (1981). The "complacency" and "inertia" feared by the Justice as a consequence of congressional inaction on the 1980 discovery amendments, 446 U.S. at 1000, have not hindered the work of the Advisory Committee. See *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 90 F.R.D. 451 (1981) (proposed amendments to Rules 6, 7, 11, 16, 26, 52, 53, and 67 and proposed Rules 72-76). For commentary, see Schroeder & Frank, *Discovery Reform: Long Road to Nowheresville*, 68 A.B.A. J. 572 (1982).

Even more recently, Congress has delayed the effective date of proposed amendments to Rule 4. See Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246.

<sup>9</sup> See letter from Representative Robert F. Drinan to Joseph F. Spaniol, Deputy Director of the Administrative Office of the United States Courts (June 24, 1980) (copy on file with the *University of Pennsylvania Law Review*); letter from Senator Edward M. Kennedy to William E. Foley, Director of the Administrative Office of the United States Courts (July 29, 1980) (copy on file with the *University of Pennsylvania Law Review*). Both letters concerned amended Rule 5(d) of the Federal Rules of Civil Procedure and were evidently intended to encourage care by federal district judges in waiving the filing requirement for discovery materials. See also letter from William E. Foley to Senator Edward M. Kennedy (August 26, 1980) (copy on file with the *University of Pennsylvania Law Review*) (responding to Kennedy's letter of July 29, 1980). In response to Senator Kennedy's request on behalf of the Senate Judiciary Committee, these letters were forwarded to all federal judges and magistrates, as well as to circuit executives and clerks of courts and divisional offices. Memorandum from Joseph F. Spaniol, Jr. (August 26, 1980) (copy on file with the *University of Pennsylvania Law Review*).

were not the only proposed rules of court before Congress during this time. Others had not fared as well,<sup>10</sup> prompting Senator Kennedy to call for a reexamination of "the whole issue of Federal judicial rulemaking."<sup>11</sup>

The imbroglio over the proposed Federal Rules of Evidence gave birth to a small body of literature,<sup>12</sup> since nourished by the continuing difficulties of federal court rulemaking and by itself,<sup>13</sup> analyzing systemic sources of those difficulties and prescribing or denigrating reforms. In addition, legislators have already put their visions of reform in proposed legislation.<sup>14</sup> The rulemakers have not been idle in the face of this criticism from the Congress and the profession. Even before Senator Kennedy suggested reexamination of federal court rulemaking, Chief Justice Burger acknowledged that "the subject is important enough to merit a fresh look."<sup>15</sup> In response to his request, the Federal Judicial Center undertook a study, focusing "on those aspects of the process

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<sup>10</sup> On April 30, 1979, the Court submitted to Congress amendments to the Federal Rules of Appellate Procedure, the Federal Rules of Criminal Procedure, the Rules Governing Proceedings in the United States District Courts under sections 2254 and 2255 of title 28, United States Code (the habeas rules), and an amendment to the Federal Rules of Evidence. The amendments to the Federal Rules of Appellate Procedure and to the habeas rules went into effect, as scheduled, on August 1, 1979. Some of the amendments to the Federal Rules of Criminal Procedure were also permitted to take effect after ninety days. However, Congress deferred the effectiveness, until December 1, 1980, of proposed amendments to a number of the Federal Rules of Criminal Procedure and of the proposed amendment to Federal Rule of Evidence 410. Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326. The latter Rules went into effect on December 1, 1980, not, however, without a fight. See 126 CONG. REC. H8544-45 (daily ed. Sept. 9, 1980); *id.* H8425-29 (daily ed. Sept. 8, 1980).

<sup>11</sup> 125 CONG. REC. S10,460 (daily ed. July 24, 1979). In 1975, Congressman Hungate observed: "Perhaps the time is ripe for Congress to re-examine the process to determine whether or not the Rules Enabling Acts ought to be amended." Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A. J. 1203, 1207 (1975); see also S. REP. NO. 1406, 89th Cong., 2d Sess. 2-3 (1966).

<sup>12</sup> See, e.g., J. WEINSTEIN, *supra* note 3; Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Lesnick, *The Federal Rule Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975).

<sup>13</sup> See, e.g., Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977); Hazard, Book Review, 87 YALE L.J. 1284 (1978); Oakes, Book Review, 78 COLUM. L. REV. 205 (1978); Wright, Book Review, *supra* note 4.

<sup>14</sup> See, e.g., H.R. 481, 96th Cong., 1st Sess. (1979) (introduced by Rep. Holtzman); H.R. 480, 96th Cong., 1st Sess. (1979) (same); see also W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 49-50 (1981).

<sup>15</sup> Address by Chief Justice Warren E. Burger, American Bar Association Mid-year Meeting 6 (Feb. 11, 1979).

that had been singled out for criticism and that might benefit from change.”<sup>16</sup> Completed in June 1981, the study reveals that steps have already been taken to respond to problems previously identified and that other changes are under consideration.<sup>17</sup>

As the Federal Judicial Center study observes, “[m]ost recent analyses are less concerned with the source, or even the location, of the [rulemaking] power than with the nature of the process itself.”<sup>18</sup> The observed inattention to questions of power extends to the statutory limitations imposed by Congress on federal court rulemaking,<sup>19</sup> even though logic would suggest an analysis of those limitations as the starting point for one interested in reform. The

<sup>16</sup> Levin, *Foreword* to W. BROWN, *supra* note 14, at vii; see *id.* vi. Chief Justice Burger has since described the study as follows: “That study, though not intended to be a complete examination of the process, provides policy makers with, among other things, a cogent analysis of the salient arguments for and against reducing the level of Supreme Court involvement in the rulemaking process. The study takes a fresh look at many of the past problems encountered in this area and deals mainly with various objections to the procedures.” Burger, *Year-End Report on the Judiciary* 23 (December 28, 1980).

<sup>17</sup> W. BROWN, *supra* note 14, at 36; see, e.g., *id.* 19-21, 125-26 (hearings held by Civil Rules Committee); *id.* 27-30, 126-28 (“gap” reports explaining changes in drafts); *id.* 27, 128-29 (availability of documents submitted by advisory committees to the Judicial Conference); *id.* 28 (preparation of statement of procedures followed for 1980 amendments to the Federal Rules of Civil Procedure). In his 1981 *Year-End Report on the Judiciary*, the Chief Justice announced that a “formal statement describing rulemaking procedures” was being prepared by the Standing Committee on Rules of Practice and Procedure of the Judicial Conference and would be considered at the March 1982 meeting of the Judicial Conference. Burger, *supra* note 16, at 22.

<sup>18</sup> W. BROWN, *supra* note 14, at 39; see also Schwartz, *The Other Things That Courts Do*, 28 U.C.L.A. L. REV. 438, 460 (1981).

<sup>19</sup> For many years most commentators have regarded as “purely academic” whether the Supreme Court has inherent power to promulgate rules of procedure for the lower federal courts in contravention of statutes. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 342 (1959); see also J. WEINSTEIN, *supra* note 3, at 5, 48, 90; Kaplan & Greene, *The Legislature’s Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 241 n.32, 251 (1951); Levin & Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3-4 (1958); Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 486-94, 500-06 (1937). As summarized in the Federal Judicial Center study: “It is now generally agreed that the power to make rules for lower federal courts has been delegated to the Supreme Court by Congress, and that Congress may withdraw or modify that power.” W. BROWN, *supra* note 14, at 39.

The confrontation over the Federal Rules of Evidence rekindled interest in the question of rulemaking power. Unfortunately, some commentators have ignored the earlier literature and hence have neglected arguments and distinctions that made their tasks considerably more difficult. See, e.g., Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177 (1978).

matter has been discussed.<sup>20</sup> Too often, however, the question of statutory authority has been rendered moot. Even in the literature specific to the proposed Federal Rules of Evidence, the arguments at times anticipated Congress's action by obscuring the distinction between power and prudence in court rulemaking.<sup>21</sup> Alternatively, they proceeded from a view of the question of statutory authority as settled<sup>22</sup> or in any event as subsidiary in interest to "the *Erie* problem."<sup>23</sup> Commentators who have ventured to take questions of statutory authority and precedent head-on have an air, occasionally self-conscious, of crying in the wilderness.<sup>24</sup>

There are obvious reasons for this reluctance to clutter process with doctrine. The state of doctrine concerning the legality of Federal Rules, for many years hopelessly confused,<sup>25</sup> has appeared simply hopeless since *Hanna v. Plumer*,<sup>26</sup> at least to those who have sought major reforms.<sup>27</sup> For one more sanguine about the

<sup>20</sup> See, e.g., Clinton, *supra* note 13, at 56-77; Wright, *supra* note 4, at 653-54; cf. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 568-74 (1967) (limitations on procedural reform).

<sup>21</sup> See, e.g., Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969). The Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9, providing that the proposed Federal Rules of Evidence "shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress," rendered moot any question about the Court's power to prescribe rules of evidence under the Rules Enabling Act.

<sup>22</sup> This phenomenon received encouragement from the Supreme Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). Compare Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 283-87 (1962) with Green, *Drafting Uniform Federal Rules of Evidence*, 52 CORNELL L. REV. 177, 204 (1967). But see, e.g., Goldberg, *The Supreme Court, Congress, and the Rules of Evidence*, 5 SETON HALL L. REV. 667, 677-79 (1974); Note, *Separation of Powers and the Federal Rules of Evidence*, 26 HASTINGS L.J. 1059, 1069-73 (1975).

<sup>23</sup> This was true both before and after *Hanna*. See, e.g., Degnan, *supra* note 22, at 287-301; Korn, *Continuing Effect of State Rules of Evidence in the Federal Courts*, 48 F.R.D. 65 (1969); Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 702-48 (1967); see also Landers, *The New Bankruptcy Rules: Relics of the Past as Fixtures of the Future*, 57 MINN. L. REV. 827, 831-32 & n.14 (1973).

<sup>24</sup> See, e.g., Clinton, *supra* note 13, at 55-76. Others have not been self-conscious. See *infra* note 34 and accompanying text.

<sup>25</sup> See, e.g., Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 428-37 (1958); Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950); Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad v. Tompkins*, 34 ILL. L. REV. 271 (1939).

<sup>26</sup> 380 U.S. 460 (1965) (holding that FED. R. CRV. P. 4(d)(1) is valid and governs service of process on an individual in a diversity action).

<sup>27</sup> For the most common attitude about the effects of that decision, see Cleary, *The Plan for the Adoption of Rules of Evidence for United States District Courts*, 25 REC. A.B. CITY N.Y. 142, 145-46 (1970); Green, *supra* note 22; Landers, *supra* note 23, at 831-33; Miller, *supra* note 23, at 738-48.

allocation of lawmaking power under the existing system, there have been other reasons to consider changes "within the framework of the existing enabling act."<sup>28</sup>

Nonetheless, since the Supreme Court first adjudicated a challenge to the validity of a Federal Rule in *Sibbach v. Wilson & Co.*,<sup>29</sup> a number of commentators have suggested that the Court's interpretation of its rulemaking authority in that case, unrepeated to date,<sup>30</sup> was broader than Congress intended.<sup>31</sup> In an important article published in 1974,<sup>32</sup> Professor (now Dean) Ely asserted that the Court has fundamentally misapprehended the limitations imposed by its basic rulemaking charter, the Rules Enabling Act of 1934.<sup>33</sup> If that proposition were to be demonstrated,<sup>34</sup> rather than merely asserted or assumed, it might suggest changes in the character of the reform debate.

It is common knowledge that the 1934 legislative record of the Rules Enabling Act is so abbreviated as to yield little of use in the search for statutory meaning.<sup>35</sup> It was common knowledge

<sup>28</sup> *Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rulemaking*, *supra* note 6, at 483 (remarks of Judge Charles Joiner).

<sup>29</sup> 312 U.S. 1 (1941) (upholding FED. R. CIV. P. 35, which authorizes physical and mental examinations of parties).

<sup>30</sup> Whatever one thinks of Professor Ely's interpretation of the Rules Enabling Act, *see* Ely, *supra* note 3, at 718-40, the notion that it "appears to reflect the Supreme Court's reasoning in *Hanna v. Plumer*," Westen & Lehman, *Is There Life for Erie after the Death of Diversity?*, 78 MICH. L. REV. 311, 362 (1980) (footnote omitted), will come as a surprise to many, including Professor Ely. *See* Ely, *supra* note 3, at 720. However, the authors of that suggestion deprive it of any operational significance, and part company with Professor Ely, by embracing a "statutory presumption of validity" and hence the *status quo*. Westen & Lehman, *supra*, at 364.

<sup>31</sup> *See, e.g.*, Clinton, *supra* note 13, at 56-64; Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842, 849-61 (1974); *see also* Lesnick, *supra* note 12, at 583.

<sup>32</sup> Ely, *supra* note 3, at 718-40.

<sup>33</sup> Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. The text of the 1934 Act is set forth *infra* text accompanying note 375. For the present version, *see supra* note 3. For the history of amendments, *see infra* text accompanying notes 399-404.

<sup>34</sup> This is something Professor Ely does not do. *See, e.g.*, Ely, *supra* note 3, at 719, 721 n.152, 724 n.170. For a similar technique at the constitutional level, *see* Landers, *supra* note 31, at 855-57.

<sup>35</sup> *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 674 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; Clinton, *supra* note 13, at 54 n.243, 55, 64; Ely, *supra* note 3, at 721 n.152; Note, *Congressional Discretion in Dealing with the Federal Rules of Evidence*, 6 U. MICH. J.L. REF. 798, 800 (1973). The record consists of very brief reports, *see* S. REP. No. 1049, 73d Cong., 2d Sess. (1934); H.R. REP. No. 1829, 73d Cong., 2d Sess. (1934), and floor remarks, *see* 78 CONG. REC. 9362-63 (1934) (Senate); *id.* 10,866 (House). *See also infra* text accompanying notes 366-73.

at the time the Rules Enabling Act was passed that it represented the conclusion of a campaign, conducted for more than twenty years by the American Bar Association, for a uniform federal procedure bill authorizing the Supreme Court to promulgate rules of procedure in civil actions at law.<sup>36</sup> It was also well known that during the campaign various incarnations of the bill that became the Act (including, as of 1924, bills essentially identical to the Act) were given thorough consideration by committees of Congress.<sup>37</sup>

Whether in 1934 or more recently, those seeking to interpret the Rules Enabling Act have, with rare exception, wholly ignored its long and once well-known history. In seeking explanations of what appears to be a remarkable feat of abnegation, one is reminded that attitudes towards statutory interpretation, and in particular towards the use of history in aid of interpretation, have not always been as expansive as they are today.<sup>38</sup> Moreover, for most law reformers and scholars in recent years, the failure to examine the history of the Act can be explained. Scholars and law reformers both need to set priorities on original investigation. Over time, one person's neglect becomes another's ignorance. Still, there remain some, working in early years and more recently, whose failure to confront the history of the Act, or to do so fully and fairly, is less easily explained.

This article is an attempt to rescue the antecedent period of travail of the Rules Enabling Act of 1934 from the oblivion

<sup>36</sup> "To rehearse now the long struggle culminating in the passage of these recent additions to the Judicial Code would seem unnecessary; especially so since the pre-natal history of these statutes has been rather fully documented, and, moreover, is conveniently preserved in Congressional hearings, reports and debates, in publications of the American Bar Association, and also in legal periodical literature." Jaffin, *supra* note 2, at 504; see also, e.g., Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L. REV. 443, 446-47 (1935); Clark & Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 388-89 (1935); *Congress Strengthens the Machinery of Justice*, 20 A.B.A. J. 422 (1934); Cummings, *The New Law Relating to Federal Procedure*, 2 U.S.L.W. 2 (1934); Ohlinger, *Questions Raised by the Report of the Advisory Committee on Rules of Civil Procedure for the District Courts of the United States*, 11 U. CIN. L. REV. 445, 478-80 (1937); Sunderland, *The Grant of Rulemaking Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116, 1116-20 (1934); Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEX. L. REV. 1, 8-10 (1934).

<sup>37</sup> See, e.g., Clark & Moore, *supra* note 36, at 394 & n.30, 411 n.114; Cummings, *supra* note 36; Ohlinger, *supra* note 36, at 468-80; Sunderland, *supra* note 36, at 1118 & n.10.

<sup>38</sup> Compare Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 865 (1930) with Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930). See also H. FRIENDLY, *BENCHMARKS* 212-19 (1967); Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 892-98 (1982).

to which it has been consigned. As background for that endeavor, I review briefly the Supreme Court decisions that have interpreted the Act.<sup>39</sup> I then consider the events and ideas that, and the individuals who, in an informed account, must be considered links in the causal chain that ends in passage of the Act.<sup>40</sup> Since there is no such account available,<sup>41</sup> since ignorance, misunderstanding or distortion of the historical record has plagued the treatment of the Act in the literature from the beginning, and since the research for this article has unearthed material that may be of interest quite apart from its bearing on the interpretation of the Act, the story is rather fully told.

If one accepts the view of interpretive relevance posited here,<sup>42</sup> the evidence of history is, in many respects, compelling, illuminating issues that should be, those that have been, and those that are, of interest in the reform debate.

The historical evidence compels the view that the limitations imposed by the famous first two sentences of the Act—

[T]he Supreme Court of the United States shall have the power to prescribe by general rules . . . the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.—

were intended to allocate power between the Supreme Court as rulemaker and Congress and thus to circumscribe the delegation of legislative power, that they were thought to be equally relevant in all actions brought in federal court, and that the protection of state law was deemed a probable effect, rather than the primary

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<sup>39</sup> See *infra* text accompanying notes 54-82.

<sup>40</sup> See *infra* text accompanying notes 83-375.

<sup>41</sup> The Act has fared somewhat, but not much, better when the purpose of the writer has been general historical background rather than interpretation. See sources cited *supra* note 36. See also C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 9 (2d ed. 1947); P. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 17-24 (1973); 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.501 (2d ed. 1980) [hereinafter cited as MOORE]; 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1003 (1969) [hereinafter cited as WRIGHT & MILLER]; Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 479-85 (1963); Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1303-05 (1936) [hereinafter cited as Clark, *Supreme Court Power*]; Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 146-48 (1948) [hereinafter cited as Clark, *Procedural Reform*]; *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 97 (1938).

<sup>42</sup> See *infra* text accompanying notes 376-408.



purpose, of the allocation scheme established by the Act.<sup>43</sup> In this aspect the history starkly contradicts the notion, shared by the Supreme Court and many commentators, that the basic purpose of the Act's procedure/substance dichotomy is to allocate law-making power between the federal government and the states.<sup>44</sup>

In addition, the history reveals that, knowingly or unknowingly, Congress was faithful to the original understanding in its 1973 decision to take responsibility for the Federal Rules of Evidence. The same materials, however, also provide support for Congress's decision to permit court rulemaking with respect to much of the field of evidence in the future.<sup>45</sup>

Finally, the history reveals that the decision to make court rules supersede inconsistent statutes was made in 1914, not 1934, and why,<sup>46</sup> and that in 1923 Chief Justice Taft wrote the second section of the bill that became the Act, inserting the provision requiring submission of proposed court rules to Congress for political reasons.<sup>47</sup> These are two among many matters of current interest in the reform debate about which original investigation permits us to substitute facts for speculation.

Of course, the history is not a Baedeker.<sup>48</sup> It cannot guide one with confidence through the maze of problems of validity that has vexed the Advisory Committee, practicing lawyers, and the courts since the Act was passed. Nonetheless, I attempt to identify standards that those who shaped the legislation suggested for allocating matters between the Court as rulemaker and Congress. The standards I derive from the pre-1934 history are significantly different from both those announced by the Supreme Court and those suggested by Professor Ely and his followers. They are standards that are consistent with the basic purpose of the procedure/substance dichotomy to allocate lawmaking power between federal institutions. Because of their origins in state law models, however, they pose substantial theoretical and practical problems in a federal system. Moreover, without refinement, they threaten the usefulness of the entire court-rulemaking enterprise. There is evidence of such refinement in the pre-1934 history of the bill that became the Act, although, as might be expected, many of

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<sup>43</sup> See *infra* text accompanying notes 415-47.

<sup>44</sup> See *infra* text accompanying notes 55-82.

<sup>45</sup> See *infra* notes 516-18 and accompanying text; 28 U.S.C. § 2076 (1976).

<sup>46</sup> See *infra* notes 161-66 and accompanying text.

<sup>47</sup> See *infra* text accompanying note 265 and *infra* note 268.

<sup>48</sup> But see T. ELIOT, "Burbank with a Baedeker: Bleistein with a Cigar," in *SELECTED POEMS OF T.S. ELIOT* 34 (1964).

the difficulties apparent in the effort to allocate power were not resolved.<sup>49</sup>

Having offered a general reinterpretation of the Act in light of the pre-1934 history, I turn to the implications of the new interpretation.<sup>50</sup> For this purpose, I take as my text the work of the original Advisory Committee on Civil Rules and the decisions of the Court. As useful as this enterprise may be for an assessment of the fidelity of the rulemakers to the statute's meaning, it is revealing even if one does not accept the interpretive relevance of the pre-1934 history or the standards derived here from that history. For review of the work of the original Advisory Committee establishes that it proceeded without a coherent or consistent view of the limitations imposed by the Act's procedure/substance dichotomy and that the Committee therefore resolved perceived problems of power on an *ad hoc* basis.<sup>51</sup> Moreover, it demonstrates that the Committee espoused at least one principle of rulemaking that calls specifically into question—as the Committee's approach in general calls into question—the presumption of validity of Federal Rules that has been central to the Court's interpretation of the Act.<sup>52</sup>

An effort of this sort is, at best, a source of new approaches in the reform debate. In the concluding section, I offer some tentative views on the adequacy of the Rules Enabling Act of 1934, reinterpreted in the light of its history, for the needs of the nation today. I also make a proposal that, in combination with procedural reforms that are underway, may help to achieve, without congressional intervention, a rational allocation of lawmaking power between the Supreme Court and Congress.<sup>53</sup>

## II. THE SUPREME COURT DECISIONS

The current debate about federal court rulemaking is in part a result of the perceived inadequacy of the limitations in the Rules Enabling Act as they have been interpreted by the Supreme Court. That debate might have commenced earlier had the Court not, from the beginning and for many years, conflated analysis under the Act and analysis under *Erie Railroad Co. v. Tompkins*<sup>54</sup> and

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<sup>49</sup> See *infra* text accompanying notes 483-524.

<sup>50</sup> See *infra* text accompanying notes 525-731.

<sup>51</sup> See *infra* text accompanying notes 528-43.

<sup>52</sup> See *infra* text accompanying notes 577-610.

<sup>53</sup> See *infra* text accompanying notes 732-83.

<sup>54</sup> 304 U.S. 64 (1938).

its progeny and limited the reach of certain Federal Rules on an *ad hoc* basis. Debate became inevitable when the Court finally parsed those problems, effectively insulating Federal Rules from *Erie* jurisprudence, but failed to reconsider its interpretation of the Act. Those seeking solutions to the rulemaking crisis in doctrine rather than process have, by and large, accepted the Court's original and enduring view that the Act's procedure/substance dichotomy was intended to allocate lawmaking power between the federal government and the states.

Since the Federal Rules of Civil Procedure became effective in 1938, the Supreme Court has considered the limits on its rule-making authority under the Rules Enabling Act in a number of cases.<sup>55</sup> In none of them has it made reference to the Act's 1934 legislative history,<sup>56</sup> and in none has it suggested the relevance of the pre-1934 legislative history, let alone of the Act's antecedent period of travail more generally.

#### A. Sibbach

In *Sibbach v. Wilson & Co.*,<sup>57</sup> the Court rejected a challenge to the validity of Rule 35 by the plaintiff in a personal injury case who had been ordered to submit to a physical examination. *Sibbach* is a marvelous vehicle for developing skepticism in law students. Viewed as an exercise in statutory interpretation, the decision is even more remarkable.

According to the Court in *Sibbach*, the first sentence of the Act delegates to the Court Congress's "undoubted power to regulate the practice and procedure of federal courts," drawing the line at substantive law because Congress

has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save

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<sup>55</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (Rule 35 as applied to a plaintiff); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) (Rule 4(f)); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956) and *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956) (Rule 54(b)); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (Rule 35 as applied to a defendant); *Hanna v. Plumer*, 380 U.S. 460 (1965) (Rule 4(d)(1)); cf. *Palmer v. Hoffman*, 318 U.S. 109 (1943) (Rule 8(c)); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (Rule 3); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (Rule 23(b)); *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) (Rule 19(b)); *Snyder v. Harris*, 394 U.S. 332 (1969) (Rule 23); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (Rule 3).

<sup>56</sup> *But cf.* *Colgrove v. Battin*, 413 U.S. 149, 162 (1973) (local Rule).

<sup>57</sup> 312 U.S. 1 (1941). This case is discussed further *infra* text accompanying notes 689-731.

where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.<sup>58</sup>

The second sentence emphasizes the limits of the delegation. A Federal Rule regulating matters properly characterized as procedural is valid. A Federal Rule regulating matters properly characterized as substantive law is invalid,<sup>59</sup> and the Rules of Decision Act, directing the application of state law, applies.<sup>60</sup>

<sup>58</sup> 312 U.S. at 9-10 (footnote omitted). See also *id.* 11, where, in discussing *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the Court observed: "Thus the matter is treated as one of procedure, for Congress has not, if it could, declared by statute the substantive law of a state." For the possible origins of these formulations, see A. MASON, HARLAN FISKE STONE: *PILLAR OF THE LAW* 480-81 n.† (1956).

<sup>59</sup> Note that the Court's opinion left open the possibility that a Federal Rule might be declared invalid because of its effect or impact on rights claimed under the substantive law, at least if the Rule were found effectively "to abolish or nullify" such a right. 312 U.S. at 10. The focus of the Court's concern, however, was solely on state substantive law. And, in suggesting that a question of validity be resolved by a choice in favor of a procedural characterization whenever that is supported by reference to one dimension of a Rule's effects, see *id.* 10 (the second sentence directs "that the court shall not 'abridge, enlarge, nor modify substantive rights,' in the guise of regulating procedure"); *id.* 14 (does the "rule really regulate procedure?"), the Court provided ample means to evade any such limitation. See also *infra* note 71.

<sup>60</sup> See 312 U.S. at 10-11. The Rules of Decision Act is codified at 28 U.S.C. § 1652 (1976).

The link between the constitutional and statutory allocation of federal and state power and the scope of the delegation in the Rules Enabling Act is made clear in the paragraph immediately following that suggesting limits on congressional power, which is quoted *supra* text accompanying note 58. That paragraph begins: "Hence we conclude that the Act of June 19, 1934, was *purposely* restricted in its operation to matters of *pleading and court practice and procedure*. Its two provisos or caveats emphasize *this restriction*." *Id.* 10 (emphasis added). The structure of the Court's argument here seems to have been borrowed from the Brief for the Respondent in *Opposition to the Petition for a Writ of Certiorari* at 6-7. Justice Frankfurter did not share the Court's misapprehension. See 312 U.S. at 19 ("But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.").

The Court's mention of § 2's enjoiner to preserve the constitutional right to jury trial as a "proviso" or "caveat" emphasizing "this restriction" suggests that the Court interpreted the Act's first sentence as itself importing a limitation on rule-making with respect to constitutional rights. In fact, such may have been Congress's intent. See *infra* text accompanying notes 488, 497, 515 & 757-60. "[T]his restriction," however, should perhaps be interpreted to include reference to the assertion, in the preceding paragraph, of Congress's power to regulate federal practice and procedure "by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States." 312 U.S. at 9-10. The Court went on to note that there are "other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." *Id.* 10 (footnote omitted).

Professor Landers has argued that *Sibbach's* reference to "other limitations" and *Snyder v. Harris*, 394 U.S. 332 (1969), remove "any implication from *Hanna*

Having stated that premise, although not any reasons for it, the Court turned to Mrs. Sibbach's argument, which it had in effect already rejected. She argued that Rule 35, authorizing physical and mental examinations of parties, was invalid, not because it was a rule of substantive law, but because it abridged her substantive rights and therefore ran afoul of the Act's second sentence.<sup>61</sup> The Court's response<sup>62</sup> was the suggestion that a third category of rights of the sort Mrs. Sibbach advocated was impossible to formulate by reference to state law or other sources and

that the full extent of Congress' legislative power derived from article III and the necessary and proper clause has been delegated for judicial rule-making." Landers, *supra* note 31, at 854. It is not clear that this is a fair reading of *Hanna*. See *infra* note 80 and accompanying text. But the pre-1934 history of the Act indicates that the conclusion is correct. See *infra* text accompanying notes 415-47. It appears, however, that the limitation in connection with jurisdiction referred to in *Sibbach* and *Snyder* was deemed by the sponsors of the bill that became the Act to be covered by the bill's procedure/substance dichotomy. See *infra* note 673. In any event, the existence of "other limitations" would not preclude the delegation of Congress's full constitutional power, in particular its power to displace state law in the twilight zone between procedure and substance, except to the extent such limitations might be infringed thereby.

Professor Landers was again correct in arguing that the Act contains limitations flowing from notions about the delegation of legislative power, although probably not in tying those limitations strictly to constitutional requirements. Compare Landers, *supra* note 31, at 854-57 with *infra* text accompanying notes 449-82.

<sup>61</sup> 312 U.S. at 11. From the outset, the Court treated the case as involving the validity of both Rule 35 and Rule 37 (governing refusal to make discovery). See *infra* text accompanying note 715.

<sup>62</sup> The Court also sought to demonstrate how two of its prior decisions on which Mrs. Sibbach relied, *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250 (1891), and *Camden & Suburban Ry. Co. v. Stetson*, 177 U.S. 172 (1900), in fact supported the conclusion that Rule 35 was valid. The Court's analysis of both confirms that it took a monolithic view of procedure and substance as marking the permissible areas for federal and state law, respectively. Thus, in discussing *Botsford*, the Court reasoned that the assumption made there, that a federal statute could authorize a physical examination, mandated the characterization of the matter as procedural. See *supra* note 58; see also *Sibbach*, 312 U.S. at 12. *Stetson* gave the Court more trouble because in that case a New Jersey statute authorizing state courts to order physical examinations had been held applicable under the Rules of Decision Act. The Court dismissed the relevance of that fact with this observation: "[T]he entire discussion goes upon the assumption that the matter is procedural. In any event, the distinction between substantive law and procedural law was immaterial, for the cause of action arose . . . in New Jersey." 312 U.S. at 12-13. As to both cases, the Court essentially adopted the reasoning of the respondent. See Brief for the Respondent in Reply to the Several Briefs Filed by Petitioner at 14-16. The Court also distinguished *Stack v. New York, N.H. & H.R. Co.*, 177 Mass. 155, 58 N.E. 686 (1900), a third case relied on by Sibbach.

Mrs. Sibbach did not share the Court's monolithic view and had cited these cases in support of her contention that Rule 35 was invalid under the Act's second sentence, because it violated her substantive rights. See Brief in Support of Petition for Writ of Certiorari at 30-39; see also *id.* 18-29. Although her briefs correctly argued that the Act's procedure/substance dichotomy was intended to allocate law-making power between the Court as rulemaker and Congress and noted the relativity of the terms used to effect the allocation, see, e.g., *id.* 18-29, they also suggested the relevance of prior classification as between the Conformity Act and the Rules of Decision Act and thus contributed to the Court's confusion. See, e.g., *id.* 38; see also *id.* 16.

would, if accepted in the interpretation of the Act, "invite endless litigation and confusion worse confounded."<sup>63</sup> "The test," the Court said, "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules [Rules 35 and 37] in question are such is admitted."<sup>64</sup>

Not until it had, in this passage, elaborated its major premise did the Court return to the question of congressional intent. In answering the contention by the four dissenting Justices that Rule 35 "work[ed] a major change of policy and that this was not intended by Congress," the Court asserted, among other things, that the Rules as a whole represented such a departure and that "the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."<sup>65</sup> Finally,

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<sup>63</sup> 312 U.S. at 14.

<sup>64</sup> *Id.* Petitioner's "admission" was as follows:

It may be that an order compelling the plaintiff to submit to a physical examination does not determine the right which plaintiff seeks to have adjudicated in the litigation. And not involving a right of this character, the order may involve "procedure" and may not involve what is commonly meant by the term "substantive law." Plaintiff contends that the order nevertheless invades her "substantive rights." This contention requires a consideration of the meaning of the limitation in the Rules Enabling Act in the light of the limitations imposed on the rule-making power of courts by the doctrine of separation of powers.

Brief in Support of Petition for Writ of Certiorari at 18.

<sup>65</sup> 312 U.S. at 14. Compare Justice Frankfurter in dissent:

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts.

*Id.* 18.

Mrs. Sibbach had also argued that Rule 35 involved questions of legislative policy that were for Congress, not the Court. See Brief in Support of Petition for Writ of Certiorari at 39-44.

The breadth of rulemaking authority read into the Act in the majority opinion in *Sibbach* was consistent with the personal views of its author, Justice Roberts, prior to his appointment. Roberts had advocated "a very broad rulemaking power." He explained:

And when I say the rulemaking power I mean, perhaps, very much more than at first blush would appear. I mean this: That the question of forms of action, the question of the initiation of an action, the question of pleadings, the question of proofs, the question of trial procedure, the question of appellate procedure and the whole genus of procedural things, from the start to the end of a litigation, ought to be in the hands of those who know best about it and who, from time to time, can make rules to meet situations as they arise in the actual practice of law.

Roberts, *Trial Procedure—Past, Present and Future*, 15 A.B.A. J. 667, 668 (1929).

the Court relied on the legislative history of the Rules, and of Rule 35 in particular, in support of its reasoning that, since "no transgression of legislative policy was found," Rule 35 was valid.<sup>66</sup>

### B. *Two Lines of Authority Following Sibbach*

Following *Sibbach*, two lines of Supreme Court authority developed for determining the reach and validity of Federal Rules of Civil Procedure. In a line of cases commencing with *Palmer v. Hoffman* in 1943, the Court interpreted a number of Rules not to cover the matters in question because of its conviction that those matters were required by *Erie* and its progeny to be governed by state law.<sup>67</sup> Another line of cases, commencing with *Mississippi Publishing Corp. v. Murphree* in 1946, upheld the validity of Federal Rules under the Act.<sup>68</sup> The results in the first or *Erie* line flowed naturally from *Sibbach's* unsupported premise that the limits of the Court's delegated authority under the Act were reached at the point that state law was found to be applicable under the Rules of Decision Act.<sup>69</sup> Just as naturally, they raised fears for the integrity of the Federal Rules of Civil Procedure, many of which appeared vulnerable to the developing *Erie* jurisprudence.<sup>70</sup> The results in the second or Enabling Act line are more difficult to characterize, although the absence of federalism concerns in those cases, at least as presented by the parties, is sug-

<sup>66</sup> 312 U.S. at 16; see *id.* 14-16.

<sup>67</sup> See *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); see also *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) (decided after *Hanna v. Plumer*, 380 U.S. 460 (1965)).

<sup>68</sup> See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Process Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); see also *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) (decided after *Hanna v. Plumer*, 380 U.S. 460 (1965)).

<sup>69</sup> As noted above, the Court in *Sibbach* hedged its conclusions about Congress's power with statements to the effect that, even if Congress could displace state substantive law, it had not done so but had, rather, directed in the Rules of Decision Act that state law be applied. See *supra* text accompanying notes 58-60. Thus, after *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), it was understandable that the Court in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), sought to accommodate the allocation scheme that the Court in *Sibbach* had said the Rules Enabling Act effected. See Note, *Erie R.R. v. Tompkins and the Federal Rules*, 62 HARV. L. REV. 1030, 1032-33 (1949). Of course, it is quite another matter to regard the results in those cases as constitutionally compelled. See Ely, *supra* note 3, at 698-99.

<sup>70</sup> See, e.g., Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1 (1949); Hill, *supra* note 25; Merrigan, *supra* note 25; Clark, Book Review, 36 CORNELL L. REV. 181, 184 (1950); see also Ely, *supra* note 3, at 721-22.

gestive.<sup>71</sup> In light of *Sibbach*, it is not surprising that none of the Court's decisions in either line thoroughly examined the question of congressional intent. It is, however, grounds for regret and a cause of the current controversy that, when the Court undertook to rationalize its previous decisions and to diminish the uncertainty they had wrought, it left *Sibbach's* major premise unexamined.

### C. Hanna

With Professor Ely's help, we know that in *Hanna v. Plumer*,<sup>72</sup> the Supreme Court sought to do with *Erie* what the Court in *Erie* had sought to do with federal common law—to reorient the law by recalling attention to its sources. We learn from *Hanna* that there is no one “*Erie* problem,” but that there are rather a number of problems of allocating lawmaking power between the federal government and the states, in the solution of which the source of the federal power asserted must be considered.<sup>73</sup> We are reminded that “[t]he line between ‘substance’ and ‘procedure’ shifts as the legal context changes.”<sup>74</sup> All of this is to the good and has provided a fresh starting point for the discussion of some

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<sup>71</sup> See cases cited *supra* note 68. Of the four cases decided before *Hanna v. Plumer*, 380 U.S. 460 (1965), only *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), involved a situation where state law might be in competition on the matter covered by the Federal Rule challenged, and that was not the line of attack taken by the challenger. See 379 U.S. at 112-14. Moreover, according to the Court, the petitioner did “not challenge the holding in *Sibbach* as applied to plaintiffs.” *Id.* 113. That made the Court's task an easy one. Cf. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 & n.22 (1968) (rejecting argument that “all indispensable parties have a ‘substantive right’ to have suits dismissed in their absence” and noting that “the question of joinder is one of federal law”). The two decisions in 1956 involved the claim that amended Rule 54(b) was invalid as modifying an Act of Congress prescribing appellate jurisdiction. See *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956); *Cold Metal Press Co. v. United Eng'g & Foundry Co.*, 351 U.S. 445 (1956). As noted *supra* note 60, the Court in *Sibbach* had suggested that limitations on rulemaking relating to jurisdiction find their source outside the Act. In *Murphree*, the Court defined away a potential problem as to the effect of Rule 4(f) on jurisdiction. See *infra* note 673. Thereafter, *Sibbach* provided ample support for the conclusion that the Rule was a rule of procedure. See 326 U.S. at 445-46; *supra* note 59. At least the Court was forced to confront the problem of the effect of Federal Rules on rights claimed under the substantive law. The distinction it suggested, between Rules having “incidental effects,” 326 U.S. at 445, and Rules operating “to abridge, enlarge or modify the rules of decision by which [the] court will adjudicate . . . rights,” *id.* 446, does not, however, provide much guidance. See *Landers, supra* note 31, at 856.

<sup>72</sup> 380 U.S. 460 (1965). This case is discussed further *infra* text accompanying notes 638-88.

<sup>73</sup> See 380 U.S. at 469-74; Ely, *supra* note 3, *passim*.

<sup>74</sup> 380 U.S. at 471.



very difficult problems of federalism.<sup>75</sup> *Hanna* has not done much, however, for our understanding of the Rules Enabling Act of 1934.<sup>76</sup>

The opinion of the Court in *Hanna* treats the validity of Rule 4(d)(1), regulating service of process on individuals, in two places. Early in the opinion, quotations from *Sibbach* and from *Mississippi Publishing Corp. v. Murphree* are deemed sufficient to demonstrate the Rule's validity under the Enabling Act line of cases.<sup>77</sup> Late in the opinion, invulnerability under *Erie*, if not the *Erie* line of cases involving Federal Rules of Civil Procedure, is demonstrated by returning to *Sibbach's* major premise and elaborating the requirements of federalism in light of the Court's newly discovered positivism.<sup>78</sup> The Court holds to the view that "both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law."<sup>79</sup> But the Court reminds us of Congress's power under the Constitution to regulate federal practice and procedure, interprets "procedure" broadly for that purpose, and fails to suggest any limitations on the Court under the Rules Enabling Act that are more restrictive than the limitations on Congress under the Constitution.<sup>80</sup> This is *Sibbach*, dressed up a bit to be sure, but *Sibbach* nonetheless.

In freeing Federal Rules from the constraints imposed on federal common law by *Erie* and its progeny, *Hanna* established

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<sup>75</sup> See Ely, *supra* note 3; Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678 (1976); Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356 (1977); Westen & Lehman, *supra* note 30; Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980); Westen, *After "Life for Erie"—A Reply*, 78 MICH. L. REV. 971 (1980).

<sup>76</sup> Ely, *supra* note 3, at 720 acknowledges this.

<sup>77</sup> See 380 U.S. at 464-65; see also *id.* 462-63 n.1; Ely, *supra* note 3, at 720.

<sup>78</sup> See 380 U.S. at 469-74.

<sup>79</sup> *Id.* 471. See also *id.* 465: "The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law."

<sup>80</sup> See *id.* 471-74. The Court did suggest that "a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* 473. But this appears to be a matter of discretion. And it is true that "what Justice Harlan termed the 'arguably procedural' test was set forth in the Court's discussion of the Constitution and not in relation to the Enabling Act." Ely, *supra* note 3, at 720. But, for any limitations in addition to those on Congress, one is remitted to the earlier quotations from *Sibbach* and *Murphree*, which are not inconsistent with the view that Congress delegated its full constitutional power to the Court. Indeed, such may have been the view of the Court in *Sibbach*. See *supra* text accompanying notes 60 & 69.

that the problems were different and thus helped to put one myth to rest.<sup>81</sup> But the Court in *Hanna* adhered to the view that both were problems of federalism, and in the hands of Professor Ely, the case gave new life to another myth.<sup>82</sup>

In sum, notwithstanding the accepted primacy of Congress in the regulation of federal procedure, neither the Court nor commentators have moved beyond speculation or assertion in the interpretation of the Act. Although that posture can be justified so long as the Act's history is confined to 1934, the relevant record cannot fairly be so confined.

### III. THE ANTECEDENT PERIOD OF TRAVAIL

The movement for a uniform federal procedure bill had its origins in the nineteenth century. At important points, it derived sustenance from, as well as sustained, procedural reform movements in the states, notably New York. The bill itself prompted debate about matters as diverse as the convenience of lawyers, the efficiency of judicial administration, and the constitutional power of Congress to delegate rulemaking power to the Supreme Court.

The uniform federal procedure bill changed shape during the long campaign for its passage. Developments in law and political theory, perceptions of practical imperatives, and individual drafting styles all played a part in its transformation. What had been, in 1912, a bill delegating court rulemaking power in categories of seemingly ascertainable and limited content became in 1924, and remained in 1934, a bill free in its first section of all but the broadest categorical restrictions, the limitations imposed by which were hardly apparent.

Yet throughout the period from 1912 to 1934, much of the rhetoric describing, and argument concerning, the bill remained the same. Moreover, in the Senate, where the debate about the bill centered after 1923, assurances were provided that, changes in language notwithstanding, its delegation was not as broad as asserted by its main critic. The draftsman of the 1924 version led this effort to cabin the bill's abstractions. He relied heavily on

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<sup>81</sup> See Ely, *supra* note 3, at 693-718.

<sup>82</sup> See Ely, *supra* note 3, at 718-40; see also Chayes, *The Bead Game*, 87 HARV. L. REV. 741 (1974); Ely, *The Necklace*, 87 HARV. L. REV. 753 (1974); Harbrecht, *The Contemporaneous Ownership Rule in Shareholders' Derivative Suits*, 25 U.C.L.A. L. REV. 1041, 1044-52 (1978); Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682 (1974); Westen & Lehman, *supra* note 30, at 359-64; cf. Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371 (1977) (extending an analysis adapted from Ely to the Federal Rules of Evidence).

reports proposing the reform of procedure in New York, failing to note the theoretical and practical difficulties posed by a borrowing for the federal system of an allocation scheme formulated for a state, let alone a state like New York, with a history of procedural regulation so different from the federal history.

In the end, as in the beginning, of the movement, the high ground in the debate about the uniform federal procedure bill involved the allocation of lawmaking power between the Supreme Court as rulemaker and Congress. State interests as such were acknowledged only late in the course of the bill's pre-1934 history. Their protection was deemed a consequence, not the goal, of the bill's procedure/substance dichotomy.

### A. *The Process Acts and the Conformity Act of 1872*

Those of us who attended law school after 1938, when *Erie* was decided and the Federal Rules of Civil Procedure became effective, may not remember from our studies that *both* events changed the source of the law applied in federal courts. We know—too well—that *Erie* and its progeny led us from a regime of bastard conformity to state “substantive” law to a regime of conformity to bastard state “substantive” law. Less clear in our minds is how the Civil Rules affected the mix of federal and state “procedural” law in the federal courts. And what a mix it was. Successive attempts by Congress to minimize discontinuities between the law applied in federal and state courts within a state culminated in an 1872 statute that many must have thought would ensure continuing conformity to state law. It did not work out that way.

#### 1. The Process Acts

For most of the nineteenth century, a source of friction created by federal courts, probably greater than the invocation of “general common law” under *Swift v. Tyson*,<sup>83</sup> was the adherence to state laws governing process that had been superseded locally as a result of changed attitudes and conditions. There were at least two routes to that friction.<sup>84</sup>

<sup>83</sup> 41 U.S. (16 Pet.) 1 (1842). “The point about *Swift v. Tyson* is that it was immediately and enthusiastically accepted . . . [T]he doctrine of the general commercial law was warmly welcomed and expansively construed, not only by the lower federal courts but by the state courts as well.” G. GILMORE, *THE AGES OF AMERICAN LAW* 33-34 (1977) (footnote omitted).

<sup>84</sup> The discussion in this section is based in part on Warren, *Federal Process and State Legislation* (pts. 1 & 2), 16 VA. L. REV. 421, 546 (1930).

a. *The Process Acts and Static Conformity*

First, a decision that a matter was subject to the Process Act of 1792,<sup>85</sup> rather than to the Rules of Decision Act,<sup>86</sup> meant that the state law to be applied—both statutes required the application of state law in actions at law—was state law of 1789<sup>87</sup> vintage and not the most recent crop. In other words, as interpreted, the Process Act required static, and the Rules of Decision Act dynamic, conformity to state law. In *Wayman v. Southard*,<sup>88</sup> the Supreme Court made such a decision with respect to the procedure to execute a judgment entered by a federal court. As a result, a post-1789 Kentucky debtor relief statute requiring a judgment creditor either to accept state banknotes in payment or to allow the defendant to give a replevin bond payable in two years was held inapplicable.

The “politically unacceptable” result in *Wayman*<sup>89</sup> could have been avoided if the trial court in that case had adopted the Kentucky statute in rules of court as it was authorized to do under the Process Act of 1792.<sup>90</sup> In fact, the federal courts in Kentucky

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<sup>85</sup> Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

<sup>86</sup> Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92.

<sup>87</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 32 (1825). The governing year was 1789 rather than 1792 because the Process Act of 1792 incorporated state procedure followed under the Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (the Temporary Process Act), which mandated strict conformity. *But see infra* note 90.

<sup>88</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>89</sup> HART & WECHSLER, *supra* note 35, at 670. *See generally* Warren, *supra* note 84, at 435-50. Congress sought to resolve the problems caused by *Wayman* and similar cases by requiring conformity to state law respecting “writs of execution and other final process issued on judgments” as of 1828, with a proviso reserving to the courts the power, by rules of court, to conform to changes made by later state statutes. Act of May 19, 1828, ch. 68, § 3, 4 Stat. 278, 281. However, static conformity as of 1789 for the original states, and as of 1828 for states admitted between 1789 and 1828, was still required as to other matters covered by the Process Acts, subject to the rulemaking provisions discussed in the text below. *See* Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278. For states admitted after 1828, *see* Warren, *supra* note 84, at 445.

<sup>90</sup> Under the 1792 Act, the obligation to conform to state law in common law actions and the obligation to apply “the principles, rules and usages which belong to courts of equity and to courts of admiralty” were made “subject . . . to such alterations and additions as the said courts . . . deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same . . .” Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. For an argument that Congress’s intent may have been different with respect to common law, equity, and admiralty, *see* Comment, *Rules of Evidence and the Federal Practice: Limits on the Supreme Court’s Rulemaking Power*, 1974 ARIZ. ST. L.J. 77, 89 n.101. *But see* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 542-47 (1971). For other early rulemaking grants, *see* Act of Sept. 24, 1789, ch. 20, § 17(b), 1 Stat. 73, 83; Act of March 2, 1793, ch. 22, § 7, 1 Stat. 333, 335; J. GOEBEL, *supra*, at 550-51.

were apparently atypical in failing to keep current with state legislation that responded to the economic miseries of the early nineteenth century by regulating final process.<sup>91</sup>

b. *Failure to Adopt Code Procedure in Court Rules*

Federal court inertia in the face of changes in state procedure was more common, however, with the advent of the code movement and was the second route to friction alluded to above. The innovations in New York's procedure associated with the name of David Dudley Field spread rapidly to the west,<sup>92</sup> and they were eligible for importation into the federal courts by court rule under the Process Act of 1792. But the attitude of the Supreme Court of the United States towards code procedure is perhaps best captured by the description of the reception of Field's 1848 Code at home:

The cold, not to say inhuman, treatment which the infant Code received from the New York judges is a matter of history. They had been bred under the common-law rules of pleading and taught to regard . . . with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings.<sup>93</sup>

In a series of opinions authored by Justice Grier, the Court heaped scorn upon the new procedure of the codes and severely deprecated its adoption by federal courts.<sup>94</sup> Many lower federal courts took the hint; some did not.<sup>95</sup> As a result, in some states the emancipation from the technicalities of common law procedure wrought by the code was complete, while in other states common law pro-

<sup>91</sup> See Warren, *supra* note 84, at 549. There is irony in this *refusal* to use local rulemaking power, since in *Wayman*, Chief Justice Marshall suggested that that power had been conferred so that federal courts could take advantage of state legislation which might rescind certain pre-1789 provisions enacted for the relief of debtors. See 23 U.S. (10 Wheat.) at 46-47.

<sup>92</sup> On Field and the code movement, see DAVID DUDLEY FIELD: CENTENARY ESSAYS (A. Reppy ed. 1949); see also C. CLARK, *supra* note 41; C. COOK, THE AMERICAN CODIFICATION MOVEMENT ch. 8 (1981); L. FRIEDMAN, A HISTORY OF AMERICAN LAW ch. 3 (1973); C. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING (1897).

<sup>93</sup> *McArthur v. Moffet*, 143 Wis. 564, 567, 128 N.W. 445, 446 (1910), *quoted in* C. CLARK, *supra* note 41, at 83.

<sup>94</sup> See *Randon v. Toby*, 52 U.S. (11 How.) 518 (1850); *McFaul v. Ramsey*, 61 U.S. (20 How.) 523 (1858); *Farni v. Tesson*, 66 U.S. (1 Black) 309 (1862); Warren, *supra* note 84, at 558-60.

<sup>95</sup> Warren, *supra* note 84, at 560. For an interesting account of the efforts of Judge Dillon to convert his colleagues on the federal bench, "old gentlemen . . . [who] understood the common law method of practice and . . . were not in love with the code," see 11 A.B.A. REP. 76 (1888).

cedure ruled in federal court from the graveyard of static conformity.

In all states, it remained necessary for lawyers practicing in federal court to master a discrete federal equity procedure. Equity had remained free of any requirement of conformity since the beginning of the Republic;<sup>96</sup> it had been governed by court rules promulgated by the Supreme Court since 1822,<sup>97</sup> and it was preserved against the depredations of code merger (via court rule) by Supreme Court interpretation.<sup>98</sup>

## 2. The Conformity Act of 1872 and Dynamic Conformity

In 1872 Congress sought to relieve the inconvenience and inconsistency resulting from optional static conformity under the Process Act of 1792. The Conformity Act of 1872<sup>99</sup> required, in "like causes," dynamic conformity "as near as may be" with respect to "the practice, pleadings, and forms and modes of proceeding in [civil causes] other than equity and admiralty causes." Moreover, the Act required such conformity automatically, "any rule of court to the contrary notwithstanding."<sup>100</sup>

The "serious" "evil"<sup>101</sup> to which the Conformity Act of 1872 was addressed might have been avoided, and the Act itself never passed, if the Supreme Court had exercised its supervisory rule-

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<sup>96</sup> The Temporary Process Act provided that "the forms and modes of proceedings in causes of equity . . . shall be according to the course of the civil law . . . ." Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93-94. Under the Process Act of 1792, the forms of process in equity, except their style, and the forms and modes of proceedings were to be "according to the principles, rules and usages which belong to courts of equity . . . as contra-distinguished from courts of common law." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. Even if desirable, conformity was impossible in many states because "in 1789 equity was either non-existent or undeveloped in the courts of many of the states." HART & WECHSLER, *supra* note 35, at 664. Equity was also within the rulemaking grant of the Act. See *supra* note 90.

<sup>97</sup> See 20 U.S. (7 Wheat.) xvii (1822).

<sup>98</sup> See *Bennett v. Butterworth*, 52 U.S. (11 How.) 702 (1850).

<sup>99</sup> Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196, 197. The Act was passed after "singularly little debate" and with no printed report. Warren, *supra* note 84, at 562.

<sup>100</sup> Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197. This section contained a proviso: "Provided, however, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the Courts thereof." *Id.* The proviso was stricken in the codification of 1878. Rev. Stat. ch. 18, § 914 (1878). See Miller, *supra* note 23, at 734-35. With respect to remedies "by attachment or other process against the property of the defendant" and to remedies "by execution or otherwise, to reach the property of the judgment debtor," the Act provided for "similar remedies" to those available in the states in 1872 (static conformity), with the federal courts empowered, in general rules, to adopt subsequent state laws. Act of June 1, 1872, ch. 255, § 6, 17 Stat. 196, 197.

<sup>101</sup> *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

making power in law actions, which was first conferred by Congress in 1792,<sup>102</sup> and which was reaffirmed and strengthened in 1842.<sup>103</sup> Given the Court's solicitude for common law procedure and its distaste for the reformed procedure of the codes, however, it is not surprising that it did nothing by court rule in the law field prior to 1872.<sup>104</sup> The provision in the 1872 Act that insisted upon conformity "any rule of court to the contrary notwithstanding" enjoined continued inactivity.<sup>105</sup>

### 3. The Conformity Act: Early Agitation for Reform

#### a. *Problems Arising from the Persistence of Federal Procedure*

Dissatisfaction with the Conformity Act developed early and increased over time, but it was never unanimous. In part, the unhappiness was a reaction to the Act's failure fully to achieve its purpose of "bring[ing] about uniformity in the law of procedure in the Federal and State courts of the same locality."<sup>106</sup> To the

<sup>102</sup> See *supra* note 90. "Supervisory rulemaking" refers to the promulgation of court rules for the conduct of proceedings in inferior courts and should be distinguished from local rulemaking, the promulgation of court rules for the conduct of proceedings in the promulgating court.

<sup>103</sup> *And be it further enacted*, That the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

Act of August 23, 1842, ch. 188, § 6, 5 Stat. 516, 518.

<sup>104</sup> In *Farni v. Tesson*, 66 U.S. (1 Black) 309, 315 (1862), the Court declined to adopt the example of state legislatures that had substituted "by codes, the whims of sciolists and inventors for the experience and wisdom of ages." On the other hand, in 1842, the Court brought out revised Equity Rules, see 42 U.S. (1 How.) xli (1842), and thereafter, for the first time, promulgated Admiralty Rules, see 44 U.S. (3 How.) ix (1844). See also *supra* note 90. For a discussion of the reasons for legislative rather than judicial leadership in the procedural reforms of the nineteenth century, see Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 599-601 (1926).

<sup>105</sup> The Court's authority to promulgate court rules in equity and admiralty was not affected by the Conformity Act of 1872 and was specifically continued by section 917 of the Revised Statutes of 1878. It was exercised, albeit infrequently. See, e.g., 226 U.S. 627 (1912) (Equity Rules); 254 U.S. 671 (1921) (Admiralty Rules).

<sup>106</sup> *Nudd v. Burrows*, 91 U.S. 426, 441 (1875).

extent that the Constitution of the United States and federal statutes regulated the procedure in federal courts, the problem was unavoidable. In 1886, Justice Samuel F. Miller protested:

[T]he Federal judges and the practitioners in the Federal courts are left to grope their way in this mingling of Federal law with that of thirty-eight states of the Union. . . . The condition of the Justices of the Supreme Court of the United States, who are bound to take judicial notice of all these different laws, and are expected to ascertain what they are, can well be imagined. As one of them, I favor codification.<sup>107</sup>

By 1896, the ABA's Committee on Uniformity of Procedure and Comparative Law complained that all but a few specialists in federal practice felt the need to rely on the clerk of court for guidance, and that a federal practitioner "even in his own state, f[elt] no more certainty as to the proper procedure than if he were before a tribunal of a foreign country."<sup>108</sup>

Quite apart from matters covered by the Constitution and federal statutes, the Conformity Act itself, in the qualifier "as near as may be," among other provisions, afforded numerous opportunities for federal courts to decline conformity to state law and thus to perpetuate the inconvenience to the bar that it was the purpose of the Act to eliminate.<sup>109</sup> The ambiguity of the Act as in-

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<sup>107</sup> Miller, *Codification*, 20 AM. L. REV. 315, 322 (1886); see also 11 A.B.A. REP. 68 (1888) (statement of Judge Dillon). An 1887 Report of the American Bar Association's Committee on Jurisprudence and Law Reform agreed that the system created difficulties for lawyers practicing, and judges sitting, in federal courts in different states; it also maintained, however, that a lawyer could approach a common-law cause in federal court "with little more special preparation than if he were acting in a similar action in the local tribunals with which he is most familiar." 10 A.B.A. REP. 317, 318 (1887). Yet another ABA Committee, in the same year, sympathized with the particular burdens of those in Justice Miller's position, and more generally concluded that the Conformity Act had "failed in the interest of justice, since the Judges of the United States Courts cannot be expected to keep pace with the minute local differences and changes constantly going on with the growth of each of the State systems." *Report of Committee on Judicial Administration and Remedial Procedure on Uniformity of Pleading and Practice in United States Courts*, 10 A.B.A. REP. 327, 327 (1887).

<sup>108</sup> 19 A.B.A. REP. 411, 420 (1896); see also *Report of Committee on Uniformity of Procedure*, 21 A.B.A. REP. 454, 462-63 (1898). Again, however, an opponent of the Committee's resolution disputed the alleged complexity of federal practice. See 19 A.B.A. REP. at 43-44 (statement of Everett P. Wheeler); see also *supra* note 107.

<sup>109</sup> See C. HEPBURN, *supra* note 92, at 157-61; Warren, *supra* note 84, at 564-67. The ABA's Committee on Uniform Judicial Procedure compiled a list of "fifty-odd notable exceptions to conformity" that became standard fare in its reports. See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 514, 525-27 (1920).



terpreted, coupled with the potential complexity of an action drawing on so many sources of procedural law, made the practitioner's job difficult. Hence, a common view of federal practice under the Conformity Act was, "To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; to the author of text books on federal practice it is a golden harvest."<sup>110</sup>

b. *Lack of Uniformity: The Predicament of Multi-State Federal Practitioners*

There was substantial agreement from the start regarding the special plight of lawyers and judges who found themselves in federal court in more than one state. The 1896 ABA report repeated the argument based on the difficulties faced by such lawyers and judges that had previously been made in 1887;<sup>111</sup> it has since become part of the litany of federal procedural reform.<sup>112</sup> At the same time, the report documented the diversity of state procedural systems and suggested another indictment of conformity: state systems that were inferior, notably New York's, were being inflicted on the federal courts.<sup>113</sup>

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<sup>110</sup> *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921). See, e.g., Note, *Conformity by Federal Courts to State Procedure*, 35 HARV. L. REV. 602 (1922). But see S. REP. No. 1174, 69th Cong., 1st Sess. 23 (1926) (Minority Views) ("[O]n the whole it is accurate to say that the practice is the same.").

<sup>111</sup> It will thus be observed that not only is the lawyer who goes outside his own state in the Federal Courts met and hampered by new and unfamiliar rules of practice, but that the judges of the Circuit Courts sitting in different states must follow the common law or the code practice with their various modifications as he happens to sit in a state following one or the other systems of procedure.

*Report of the Committee on Uniformity of Procedure and Comparative Law*, 19 A.B.A. REP. 411, 419 (1896) [hereinafter cited as *Committee Report*]. For the previous use of the argument, see *supra* note 107.

<sup>112</sup> See, e.g., *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 89-91 (1973) (statement of Albert Jenner). An amusing variant of the argument appeared in *The English Judicature Act and the American Codes*, 64 CENT. L.J. 105, 105 (1907):

How matters would be simplified and unified all over the country if the English Act were adopted for the United States courts and by all the states. An English lawyer could without embarrassment practice in the United States, and an American lawyer could with equal facility practice in the dominions of Great Britain, and as the English code is practically drawn from the civil law he would not be disqualified because of a lack of knowledge of procedure in any place where the civil code is in use.

<sup>113</sup> See *Committee Report*, *supra* note 111, at 418-19.

B. *The ABA and the Quest for Uniform Federal Procedure in the Nineteenth Century*

The charge of the ABA Committee on Uniformity of Procedure and Comparative Law had been to "inquire into and collate the facts relative to the movement now in progress to further a uniform system of legal procedure, and the study of comparative legislation on that subject throughout the English-speaking world."<sup>114</sup> This was a time of growing interest in uniform legislation generally.<sup>115</sup> Nevertheless, the Committee's report suggested as the main reason to strive for uniformity the possibility of reform through comparative law.<sup>116</sup> The experience of the chairman of the Committee, who was intimately involved in the

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<sup>114</sup> *Id.* 411. The idea of uniformity was not a new one for the Association. Speaking in support of an 1888 ABA resolution favoring a federal code of procedure, David Dudley Field suggested that "if a Federal code of procedure is once made the codes of procedure of the various states (for I believe there will be one in every state eventually) will naturally assimilate themselves to the code of Federal procedure," which, he thought, was "what we all desire." 11 A.B.A. REP. 69-70 (1888). The resolution provided: "That in the opinion of this Association the preparation of a code or codes of procedure for the United States courts, regulating both civil and criminal proceedings, is both desirable and practicable." *Id.* 64. Field had previously sought ABA support of a Senate bill providing for the appointment of a commission to prepare a federal code of procedure. See 9 A.B.A. REP. 75 (1886). The 1888 resolution was a substitute.

Field did not need to explain why national uniformity resulting from state adoptions of a federal model was an argument in favor of a federal code of procedure, because he had just noted the objection that uniform federal procedure would create inconvenience:

I went before a committee of each House to urge [a bill for the appointment of a commission to prepare a federal code of procedure], and I found there generally an assent to the principle, with only now and then an objection, namely, that it would be very convenient for lawyers and for judges to have the practice, conformable to the state practice always.

11 A.B.A. REP. 69 (1888).

<sup>115</sup> The ABA's Committee on Uniform State Laws was appointed in 1889. See 12 A.B.A. REP. 50-51 (1889); Radin, *The Achievements of the American Bar Association: A Sixty Year Record*, 25 A.B.A. J. 903, 1007-09 (1939). C. C. Bonney, who offered an alternative proposal to achieve uniform federal procedure in 1886, see 9 A.B.A. REP. 78-79, 503-05 (1886), had previously promoted a model federal law of negotiable paper. Radin, *supra*, at 1008. The resolution calling for the appointment of the Committee on Uniformity of Procedure and Comparative Law was thought to be "germane to the report of [the] Committee [on Uniform State Laws]." 18 A.B.A. REP. 32 (1895) (statement of J. Newton Fiero). It was stimulated by a movement looking towards "Uniformity in Methods of Procedure in Englishspeaking countries." *Id.* 33.

<sup>116</sup> See *Committee Report*, *supra* note 111, at 417. The Committee's survey had yielded responses from 43 states "almost unanimous in expressing a decided opinion in favor of the desirability of [assimilating the practice of the state courts and federal courts by rules regulating procedure], and a large majority believe in its possibility, although as to its probability within a reasonable time, the views are not so positive." *Id.* The Committee's Report was cited as evidence of a "general tendency towards a uniform system of procedure in all the states." C. HEPBURN, *supra* note 92, at 136. It concluded that federal leadership was necessary because

reform movement in New York, lurks not far below the surface of the report.<sup>117</sup>

The 1896 resolution of the ABA Committee on Uniformity of Procedure and Comparative Law, calling for a congressional study commission, was defeated,<sup>118</sup> and it was laid on the table when renewed in 1898.<sup>119</sup> It may have been a mistake for the ABA Committee to substitute for its original 1896 resolution, which contemplated proposals (including court rules) formulated by lawyers selected by the judiciary, the congressional study commission plan.<sup>120</sup> The Committee's own report well made the case against "placing full power and control in the legislatures"<sup>121</sup> and in favor of a system implemented by court rules.<sup>122</sup> Moreover, from the earliest years of the movement to secure a uniform federal law of procedure, there was a difference of opinion as to methods. Attempts by the ABA to secure a federal code of procedure, led by David Dudley Field,<sup>123</sup> were made at the end of Field's career and of the codification movement.<sup>124</sup> Even at that

the divergence of views and lack of commitment to procedural reform among the states made uniform legislation (as promoted by the Committee on Uniform State Laws) unattainable. See *Committee Report*, *supra* note 111, at 422-23.

<sup>117</sup> J. Newton Fiero was chairman of the New York State Bar Association from 1892 to 1894. In 1893 he vigorously attacked the state's Code of Civil Procedure (the Throop Code), calling for its "revision, rearrangement and reconstruction." 16 N.Y. ST. B.A. REP. 51 (1893). Thereafter, he was active and prominent in the Association's reform efforts. He was for many years chairman of the Committee on Law Reform. See, e.g., 21 N.Y. ST. B.A. REP. 173, 331 (1898). In 1898 he was appointed chairman of the Committee on Code Revision, the report of which established some of the basic principles of subsequent reform efforts in the state and had effect at the national level as well. See 22 N.Y. ST. B.A. REP. 170 (1899); *infra* note 134. His 1896 ABA Report made many references to the New York experience. See, e.g., *Committee Report*, *supra* note 111, at 411, 414, 415, 418, 421-22, 422-23 (1896).

<sup>118</sup> 19 A.B.A. REP. 47 (1896); see *infra* note 120.

<sup>119</sup> 21 A.B.A. REP. 36 (1898).

<sup>120</sup> See *Committee Report*, *supra* note 111, at 423-24 (1896). The Committee's substitute resolution, as offered on the floor, would have led to the appointment "of a commission to inquire into and report upon the practicability and expediency of framing a system of procedure, civil and criminal, for use in the Federal jurisdiction . . ." Chairman Fiero noted that it was "not so broad as the suggestions which were made by the Committee [in its report]" but had been drawn after consultation with members of the Committees on Uniform State Laws and on Federal Code of Criminal Procedure. *Id.* 43.

<sup>121</sup> *Id.* 418.

<sup>122</sup> *Id.* 420-21.

<sup>123</sup> See *supra* note 114.

<sup>124</sup> See Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD: CENTENARY ESSAYS, *supra* note 92, at 55, 60-61. Field's foremost opponent in the last debate in New York over general codification had already acknowledged, with reference to state law, that procedure "may not inappropriately be reduced to statutory form," but he had suggested rules of court as the preferred vehicle. J. CARTER, THE PROPOSED CODIFICATION OF OUR COMMON LAW 84 (1884). For a reassessment

time, there were proposals before the Association, and bills before Congress, for a system modeled on the Supreme Court's Equity Rules.<sup>125</sup> Some of the opposition to the 1896 resolution reflected this disagreement about methods.<sup>126</sup> But disagreements about methods were not the most serious obstacle. Among the arguments against the 1896 ABA resolution was the claim that the Conformity Act system "seems to be perfectly satisfactory to the American Bar."<sup>127</sup>

### C. *The Reform Movement Matures*

#### 1. Roscoe Pound and the ABA Committee of Fifteen

The first decade of this century witnessed the birth of serious and widespread interest in reform of judicial administration and the renascence of interest in reform of judicial procedure. Roscoe Pound's 1906 paper, "The Causes of Popular Dissatisfaction With the Administration of Justice,"<sup>128</sup> precipitated a furor when it was delivered at the ABA's annual meeting in St. Paul.<sup>129</sup> Within a year, however, the Association's Committee on Judicial Administration and Remedial Procedure had issued a report concluding that "many evils suggested in Mr. Pound's paper do exist" and recommending the appointment of a special committee to address them.<sup>130</sup> A Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, more commonly known as the Committee of Fifteen, was

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of Field's role in the codification movement of the nineteenth century, see C. Cook, *supra* note 92.

<sup>125</sup> See, e.g., 9 A.B.A. REP. 78-79, 503-05 (1886) (bills introduced by C.C. Bonney); *Report of the Committee on Judicial Administration and Remedial Procedure on Uniformity of Pleading and Practice in United States Courts*, 10 A.B.A. REP. 327 (1887); 11 A.B.A. REP. 70-79 (1888); Note, *A National Code of Procedure*, 18 AM. L. REV. 464 (1884).

<sup>126</sup> "Why should we want Congress—of all bodies the most incompetent—to deal with this subject or to appoint a commission to deal with it and to tell lawyers how to practice before the courts?" 19 A.B.A. REP. 44 (1896) (statement of Everett P. Wheeler).

<sup>127</sup> 19 A.B.A. REP. 47 (1896) (statement of Adolph Moses). Congress had failed to take action on the ABA's 1888 resolution, which was brought to its attention by a committee specially appointed for that purpose. See *Report of the Committee on Judicial Administration and Remedial Procedure*, 15 A.B.A. REP. 313 (1892). In 1892, the effort was renewed only as to criminal proceedings, because there was "a division of opinion among the members of [the] Association and the legal profession generally with respect to the resolution so far as it relates to the preparation of a code of procedure regulating civil proceedings . . ." *Id.* 314.

<sup>128</sup> 29 A.B.A. REP. 395 (1906).

<sup>129</sup> See *id.* 55-65.

<sup>130</sup> 31 A.B.A. REP. 505, 511-12 (1907).

appointed; Pound was made one of its members, and the Committee vigorously pursued its charge. Its 1909 report included a section on "General Principles of Reformed Procedure."<sup>131</sup> The report contrasted the "legislative tinkering" in New York that had turned the original Field Code of 1848 into an "overgrown mass of detail" with the English Judicature Act of 1873 and suggested the Supreme Court's rulemaking power in equity, admiralty and bankruptcy as a "model that all our jurisdictions may well follow" with respect to the "details of adjective law."<sup>132</sup>

The ABA Committee of Fifteen's proposal for procedural reform was not new. The advantages of a system of procedure implemented by rules of court had been discussed in the 1896 and 1898 reports of the ABA Committee on Uniformity of Procedure and Comparative Law.<sup>133</sup> Similar advantages were noted in New York, where the appropriate division of responsibility for procedure between the legislature and the courts had been explored in detail.<sup>134</sup>

<sup>131</sup> 34 A.B.A. REP. 578, 588 (1909). The second principle stated:

WHENEVER IN THE FUTURE PRACTICE ACTS OR CODES OF PROCEDURE ARE DRAWN UP OR REVISED, THE STATUTES SHOULD DEAL ONLY WITH THE GENERAL FEATURES OF PROCEDURE, AND PRESCRIBE THE GENERAL LINES TO BE FOLLOWED, LEAVING DETAILS TO BE FIXED BY RULES OF COURT, WHICH THE COURTS MAY CHANGE FROM TIME TO TIME, AS ACTUAL EXPERIENCE OF THEIR APPLICATION AND OPERATION DICTATES.

*Id.* 595.

<sup>132</sup> *Id.* 596. The Report goes on to state: "The ideal would be a clear and scientific outline, of say one hundred sections, laying out the limits and the lines of procedure, to be developed by rules of court which may be enacted, revised, amended or abrogated by experts as the exigencies of judicial administration demand." *Id.* 597.

<sup>133</sup> See *supra* text accompanying notes 122-23; 21 A.B.A. REP. 454 (1898).

<sup>134</sup> In its 1899 report, the Committee on Code Revision of the New York State Bar Association specified as three of the objects to be accomplished by code reform:

Third. To distinguish between such matters of procedure as relate to jurisdiction and the like, and those matters relating to practice which are mere details, by placing the important and jurisdictional matters in a statute, and leaving the more unimportant parts to be provided for by rules of court; it is quite clear that matters relating to the organization of the courts, the powers and duties of judicial officers, the more important regulations relating to the commencement and the progress of an action and the effect of judgment, are statutory, while matters relative to the interlocutory proceedings in an action, amendments, motions and the like, may well be relegated to rules.

Fourth. To place the various provisions of substantive law which have crept into the Code in their proper positions in the statutes relating to cognate topics. . . .

Fifth. . . . [T]o place the control of the details of practice with the courts by which it was uniformly exercised, up to the time of the enactment of the Code of 1848.

22 N.Y. ST. B.A. REP. 170, 179-80 (1899).

In 1909, the ABA's Committee of Fifteen eschewed any attempt to formulate either uniform legislation or legislation for the federal courts.<sup>135</sup> In its 1910 Report, however, the Committee noted that it was considering a practice act for the federal courts.<sup>136</sup> In the Report, the Committee also presented nine "Principles of Practice Reform,"<sup>137</sup> which were disseminated in three articles published by Pound in the same year.<sup>138</sup> Pound characterized the practice act/rules of court principle as "the first and most funda-

The ABA and New York Committees shared a chairman. See *supra* note 117.

To the extent that the New York Association advocated "a short practice act covering jurisdictional matters mainly, leaving the details of practice to be controlled by rules of court like the system in England," its plan was the subject of the objection that "it vested in judicial officers legislative functions, which was un-American and not suited to our system." The objection, although not the identity of those making it, was reported in the 1901 Report of the Special Joint Committee on Statutory Revision Commission Bills of the Legislature of the State of New York. It had been brought directly to the attention of the Association by the Chairman of the Joint Committee. Rodenbeck, *The Work of the Joint Committee on Statutory Revision Commission Bills of the Legislature of the State of New York*, 24 N.Y. St. B.A. REP. 265, 279 (1901).

Those voicing the criticism disagreed with the State Bar Association as to the nature and number of matters to be covered in rules of court rather than the practice act. Rodenbeck acknowledged "some difference of opinion whether the practice should be governed by legislative act or by rules adopted by the courts." *Id.* 282. His own position was unclear, see *id.* 281-82, 286, but was reported to be "for a legislative act of procedure, instead of rules of court." *Id.* 333. The Committee on Law Reform took the position that the Joint Committee's plan "to reduce the practice provisions to a single act, does not necessarily exclude power to the court to make rules, and the extent to which rules shall be provided for in place of statutes, is left an open matter, and one for future determination." 24 N.Y. St. B.A. REP. 287, 312 (1901). But it had also expressed the view that the Joint Committee, "as at present constituted, inclines strongly toward embodying the main features, at least of the practice, in a statute." *Id.* The Association was, understandably, unsure of the Joint Committee's position and thus agreed to endorse its 1900 plan only with a reiteration of its "preference that the details of practice should be in the form of rules of court." *Id.* 335.

The 1903 report of a New York Committee of Fifteen authorized by an act of the legislature attempted to accommodate these conflicting views by recommending a "middle ground" in which "minor matters" would be left to court rules, while the "more important matters of practice" would be enacted in a statute. 26 N.Y. St. B.A. REP. 318, 347 (1903). The legislation pursuant to which the Committee was appointed was secured largely through the efforts of the Association, and the Committee's members included, among other members of the Association, J. Newton Fiero. See *id.* 324-26; *supra* note 117. The Committee's report was endorsed by the Association. See 26 N.Y. St. B.A. REP. at 363-64.

<sup>135</sup> See 34 A.B.A. REP. 578, 588 (1909).

<sup>136</sup> See 35 A.B.A. REP. 614, 616 (1910). The Committee's resolution that it be authorized to consider and report on a federal practice act was adopted. *Id.* 65-66.

<sup>137</sup> *Id.* 635-48. The principles were prepared by Roscoe Pound. The first of them was essentially identical to the second principle in the 1909 Report. See *supra* note 131.

<sup>138</sup> See Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910); Pound, *A Practical Program of Procedural Reform*, 22 GREEN BAG 438 (1910) [hereinafter cited as Pound, *Practical Program*]; Pound, *Principles of Practice Reform*, 71 CENT. L.J. 221 (1910) [hereinafter cited as Pound, *Practice Reform*].

mental in a program of procedural reform.”<sup>139</sup> But he stressed the importance of defining clearly those matters subject to, and those beyond the reach of, court rules, invoking as a model the English Judicature Act of 1873.<sup>140</sup> In that year, too, President Taft, whose support of a system of procedure on the English model had been cited by the ABA Committee of Fifteen in 1909,<sup>141</sup> told Congress of the need for reform of procedure in federal and state courts, concluding “that the best method of improving judicial procedure at law is to empower the Supreme Court to do it through the medium of the rules of the court, as in equity. This is the way in which it has been done in England, and thoroughly done.”<sup>142</sup>

## 2. The Origins of the ABA Committee on Uniform Judicial Procedure

In 1911 the tempo quickened. After decades of neglect, the Supreme Court undertook to revise its Equity Rules.<sup>143</sup> In a speech on procedural reform, Elihu Root told the New York State Bar Association that “the method [of code procedure] is wrong; the theory is wrong; and that the true remedy is to sweep from our statute books the whole mass of detailed provisions and substitute a simple Practice Act containing only the necessary, fundamental rules of procedure, leaving all the rest to the rules of Court . . . .”<sup>144</sup> Discussing the lawyer in politics, Woodrow Wilson told the Kentucky Bar Association: “The American Bar is behind every other bar in Christendom in respect to the simplification of legal procedure.”<sup>145</sup> Thomas W. Shelton, a lawyer from Norfolk,

<sup>139</sup> Pound, *Practice Reform*, *supra* note 138, at 222.

<sup>140</sup> “Probably the best device would be that adopted in the English Judicature Act of 1873,—to put the permanent and unalterable provisions in the form of sections and append a schedule of rules of practice to serve as rules of court until set aside, amended or added to by the Supreme Court.” Pound, *Practical Program*, *supra* note 138, at 447.

<sup>141</sup> See 34 A.B.A. REP. 578, 597 (1909).

<sup>142</sup> 46 CONG. REC. 17, 26 (1910).

<sup>143</sup> The ABA was asked to help. See 36 A.B.A. REP. 44 (1911); Wheeler, *Procedural Reform in the Federal Courts*, 66 U. PA. L. REV. 1, 2-3 (1917). The Court’s action was later credited with giving “[g]eneral stimulation” to the movement to secure similar authority for actions at law. Shelton, *Uniform Judicial Procedure Will Follow Simplification of Federal Procedure*, 76 CENT. L.J. 207, 208 (1913).

<sup>144</sup> Root, *Reform of Procedure*, 34 N.Y. ST. B.A. REP. 87, 89 (1911); see *id.* 92-93.

<sup>145</sup> Wilson, *The Lawyer in Politics*, 1911 KY. ST. B.A. PROC. 99, 116. Wilson’s speech (as well as Taft’s message) became a standard item of reference in a chronology used by the ABA Committee on Uniform Judicial Procedure. The ex-

Virginia, began "well-organized propaganda"<sup>146</sup> for the regulation of judicial procedure in the federal courts by the Supreme Court of the United States. In two articles published in 1911 and another in 1912,<sup>147</sup> Shelton argued that uniformity of procedure was essential, along with uniformity of interpretation, to the goal of uniformity of law.<sup>148</sup> He asserted the failure of the Conformity Act<sup>149</sup> and saw a federal model, prepared by the Supreme Court, as the best hope for national uniformity.<sup>150</sup> At the 1911 ABA annual meeting, Shelton introduced a resolution that marked the formal commencement of an effort that was to last more than twenty years.<sup>151</sup>

In the following year, the Report of the ABA Committee on Judicial Administration and Remedial Procedure recommended

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cerpt used by the ABA, however, is nowhere to be found in the printed version of Wilson's speech. See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 520-21 (1920).

<sup>146</sup> Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free*, 73 CENT. L.J. 319, 319 (1911).

<sup>147</sup> See Shelton, *supra* note 146; Shelton, *The Relation of Judicial Procedure to Uniformity of Law*, 72 CENT. L.J. 114 (1911) [hereinafter cited as Shelton, *Judicial Procedure*]; Shelton, *Let Congress Set the Supreme Court Free*, 75 CENT. L.J. 126 (1912) [hereinafter cited as Shelton, *Supreme Court*]; see also Shelton, *Simplification of Legal Procedure—Expediency Must Not Sacrifice Principle*, 71 CENT. L.J. 330 (1910). Shelton was Associate Editor of this periodical. *Committee on Uniform Judicial Procedure*, 75 CENT. L.J. 357, 357 (1912).

<sup>148</sup> See Shelton, *Judicial Procedure*, *supra* note 147.

<sup>149</sup> See Shelton, *supra* note 146, at 320-22; Shelton, *Supreme Court*, *supra* note 147, at 126-27.

<sup>150</sup> See, e.g., Shelton, *Judicial Procedure*, *supra* note 147, at 117.

<sup>151</sup> See 36 A.B.A. REP. 50 (1911). The resolution provided:

WHEREAS, Section 914 of the Revised Statutes [the Conformity Act of 1872] has utterly failed to bring about a general uniformity in federal and state proceedings in civil cases; and

WHEREAS, It is believed that the advantages of state remedies can be better obtained by a permanent uniform system, with the necessary rules of practice prepared by the United States Supreme Court;

Now, therefore, be it, and, it is Hereby resolved:

First: That a complete uniform system of law pleading should prevail in the federal and state courts;

Second: That a system for use in the federal courts, and as a model, with all necessary rules of practice or provisions therefor, should be prepared and put into effect by the Supreme Court of the United States;

Third: That to this end, Sec. 914 and all other conflicting provisions of the Revised Statutes should be repealed and appropriate statutes enacted;

Fourth: That for the purpose of presenting these resolutions to Congress and otherwise advocating the same in every legitimate manner, there shall be appointed a committee of five members to be selected by the President to be known as "The Committee on Uniform Judicial Procedure."

37 A.B.A. REP. 434-35 (1912).



adoption of Shelton's resolution.<sup>152</sup> A motion to that effect carried, and the ABA Committee on Uniform Judicial Procedure came into being under Shelton's leadership.<sup>153</sup>

#### D. *The ABA Committee on Uniform Judicial Procedure and the Uniform Federal Procedure Bill: 1912-1921*

##### 1. The Clayton Bill

Shelton's Committee wasted no time. Before the year ended, the Committee collaborated with Judge Henry D. Clayton, Chairman of the House Judiciary Committee, in preparing a bill that was introduced in both houses.<sup>154</sup> The bill was supported by former President Taft and Attorney General McReynolds, among others, prompting Shelton to predict at the 1913 ABA annual meeting that it would be passed at the next session of Congress.<sup>155</sup>

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<sup>152</sup> See 37 A.B.A. REP. 434, 435 (1912). The Committee found that the Conformity Act had failed to bring about uniformity, that uniformity was desirable, and that a uniform system of law pleading and procedure prepared by the Supreme Court for the federal courts would, in time, attract emulation by the states. See *id.* The Committee also considered, but made no recommendation with respect to, a resolution of the Wake County Bar Association, North Carolina, which endorsed a bill designed to achieve conformity in law and equity. See *id.* 435-36; Sunderland, *supra* note 36, at 1123.

<sup>153</sup> See 37 A.B.A. REP. 35-36 (1912). The five individuals first appointed to the Committee were Shelton, J.M. Dickinson, William B. Hornblower, Louis D. Brandeis, and Joseph N. Teal. *Id.* 142.

<sup>154</sup> See H.R. 26,462, 62d Cong., 3d Sess. (1912); S. 8454, 62d Cong., 3d Sess. (1912) (reprinted in 38 A.B.A. REP. 542 (1913)). The bill provided:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States.

The Committee's 1913 Report states that the statute was "prepared with the advice and assistance of" Clayton. *Report of the Committee on Uniform Judicial Procedure*, 38 A.B.A. REP. 541, 542 (1913). During the annual meeting, Shelton was asked whether the Committee drafted the act that it wanted adopted. He replied: "The specific act was drafted by Judge Clayton of the House Committee." *Id.* 37; *accord Hearings on ABA Bills Before the House Comm. on the Judiciary*, 63d Cong., 2d Sess. 22 (1914) [hereinafter cited as 1914 *House Hearings*]; letter from the Hon. Henry D. Clayton to the Hon. Thomas J. Walsh (May 26, 1926) (Thomas J. Walsh Papers, Library of Congress, Washington, D.C., Container 302 [hereinafter cited as Walsh Papers]). But see Sunderland, *supra* note 36, at 1118. The bill was commonly referred to, and will be referred to hereafter, as amended after the 1914 House Hearings, as the "Clayton bill."

<sup>155</sup> See 38 A.B.A. REP. 35 (1913). The ABA Committee's first report, establishing a format that would be followed in later years, dwelled upon the numerous

At the request of the ABA, the House Judiciary Committee held hearings on the Clayton bill in early 1914.<sup>156</sup> In his testimony, former President Taft, by then President of the ABA, again<sup>157</sup> expressed his personal preference for a merged system of law and equity procedure, but he bowed to political considerations and supported the bill.<sup>158</sup> Shelton's testimony added little to his

individuals who, and organizations which, supported the bill, explained why it had not been passed in the most recently concluded sessions of Congress, and urged those dissatisfied to convert their complaints into "concrete and persistent demands for immediate action by Congress." *Report of the Committee on Uniform Judicial Procedure*, 38 A.B.A. REP. 541, 543-44 (1913). Notwithstanding the Association's action in 1912, however, the adoption of the Committee's report was not without opposition. Moorfield Storey, a former President of the ABA, objected that the disuniformities within a state that would result from uniform federal procedure "would be more dangerous than the existing system." 38 A.B.A. REP. at 35. He also argued that a representative commission was better suited to the task than the Supreme Court, which was overburdened and had recently promulgated revised Equity Rules, an effort that evidently did not impress Storey. *See id.* 35-36. Another member moved that the report be referred back to the Committee so that it might embody the principle that the distinction between actions at law and suits in equity should be abolished. *See id.* 39-40. Finally, a third member contended that the Conformity Act system best served "the convenience and accommodation of the vast majority of the Bar," whose practice was confined to a single state, and, since the Clayton Bill would not yield uniformity among the States, should not be disturbed. *Id.* 44.

There was doubt whether, in light of the Association's previous actions on this subject, opposition to the basic thrust of the campaign was in order. *See id.* 37-38. *But see id.* 43. The failure to attempt the unification of procedure in law and equity was explained on grounds of political reality, many lawyers in Congress believing that there were "constitutional difficulties." Transfer from equity to law, already authorized under the 1912 Equity Rules, and from law to equity, authorized (among other things) in a bill proposed by the Committee of Fifteen, were thought to "go as far as it is possible to go at present." *Id.* 42.

<sup>156</sup> 1914 *House Hearings*, *supra* note 154. The Clayton bill had been reintroduced as H.R. 133, 63d Cong., 1st Sess. (1913). The Hearings also considered H.R. 4545, 63d Cong., 2d Sess. (1913), the ABA-sponsored bill providing, among other things, for the amendment of pleadings from law to equity and for interposing equitable defenses in actions at law. *See supra* note 155. The latter bill became the Act of March 3, 1915, ch. 90, 38 Stat. 956.

<sup>157</sup> In his inaugural address as President of the ABA, Taft had observed: "[M]y own judgment about the Shelton Bill is that it is not quite radical enough. I think it ought to provide that all suits in the federal court should be brought in one form of civil action, thus uniting cases in law and equity . . ." 39 A.B.A. REP. 381-82 (1914).

<sup>158</sup> *See* 1914 *House Hearings*, *supra* note 154, at 16. Taft welcomed the Clayton bill and H.R. 4545 as steps in the right direction, but he expressed the hope that Congress ultimately would "go all the way and give to the Supreme Court the opportunity to make rules uniting the two." *Id.*

Commentators have treated the ABA's original failure to seek a merged system of law and equity procedure as inadvertent, misguided, or worse. *See, e.g.,* Chandler, *supra* note 41, at 480-81; Clark, *Procedural Reform*, *supra* note 41, at 146-47; Ilse, *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 ST. JOHN'S L. REV. 212, 213 (1937); *Policies Involved in Federal Rule-Making*, 18 J. AM. JUDICATURE Soc'y 134 (1935); Sunderland, *supra* note 36, at 1123-24. As the discussion at the 1913 ABA annual meeting, *supra* note 155, and the 1914 House Hearings indicate, however, it was a considered response to the constitutional doubts of legislators, reflecting the view that, as Taft put it, "what you want to do in getting legislation

previous expressions on the subject, except a more realistic sense of priorities among the goals of the proposed legislation.<sup>159</sup> At one point in his testimony, however, Shelton described the ABA's program using words and concepts that came to assume prominence:

The Supreme Court would gather from the spirit and letter of the statute the desire of Congress to make an equitable division of duty as to the courts, leaving to the court the preparation of the detailed machinery *but reserving to itself all fundamental and jurisdictional matters*. In other words, Congress would tell the Supreme Court what the *nisi prius* courts may and shall do, but will [*sic*] leave it to the experience of that great tribunal to provide how they shall do it. . . .

. . . [The bill] will set the Supreme Court free to do those things it is prepared and properly situated to do, *the Congress confining itself to substantive, jurisdictional, and fundamental matters*.<sup>160</sup>

The issue that consumed most of the discussion at the 1914 House Hearings concerned the effect of the Clayton bill on existing federal statutes. The ABA's witnesses resisted an amendment that would have rendered the court rules promulgated pursuant to the proposed legislation subordinate to other statutes.<sup>161</sup> More

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is to get as much as you can and not ask for too much and defeat the whole." 1914 *House Hearings*, *supra* note 154, at 16. In that regard, it should be noted that such constitutional doubts were not restricted to members of Congress. See, e.g., 2 CALIF. L. REV. 150, 151 (1914). Indeed, as late as 1909, in his annual message to Congress, Taft himself had presumed that a unitary form of action in the federal courts was "impossible, without an amendment to the Constitution." 45 CONG. REC. 25, 31 (1909).

On the other hand, not everyone in the reform movement was convinced, with Taft, that further legislation (in addition to H.R. 133 and H.R. 4545) was necessary to truly effective reform. See 1914 *House Hearings*, *supra* note 154, at 25.

<sup>159</sup> See 1914 *House Hearings*, *supra* note 154, at 23-24. Judge Parker, President of the New York State Bar Association, was even more realistic, observing about uniform procedure among the states on a federal model: "It is not to come in your time or mine, but nevertheless it is an ideal which should be reached in the future." *Id.* 26.

<sup>160</sup> *Id.* 22-23 (emphasis added).

<sup>161</sup> The grant of authority to promulgate Equity Rules under § 917 of the Revised Statutes, on which the Clayton bill may have been modeled, specified that the Supreme Court "shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States . . ." Rev. Stat. § 917 (1878) (emphasis added). The provision is hardly unambiguous. The language of the 1914 proposed amendment, "not inconsistent with any law of the United States," had originally been left out after consultation between Representative Clayton and Shelton. See 1914 *House Hearings*, *supra* note 154, at 21-22. At the hearings, Shelton and Judge Parker opposed it on the grounds that it would require the repeal of numerous statutes, the specification of which was a difficult

generally, they resisted proposals for naming the statutes to be repealed by the rules.<sup>162</sup> Members of the Committee were uneasy about the constitutionality of delegating "to the Supreme Court . . . the authority to repeal an existing statute."<sup>163</sup> They ultimately accepted the position of Senator Elihu Root of New York that any superseding effect derived from the authorizing statute, although they agreed that such effect should be made explicit in the statute.<sup>164</sup> None of the participants at the hearings, however, was troubled by the constitutionality of the basic delegation (that is, with the exception of its super-statutory aspect), at least after a discourse by Root placing it in the context of the times.<sup>165</sup>

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enterprise, and would breed controversy regarding the status of the Conformity Act. See *id.* 21-22, 25.

<sup>162</sup> See *supra* note 161; 1914 *House Hearings*, *supra* note 154, at 36.

<sup>163</sup> 1914 *House Hearings*, *supra* note 154, at 36.

<sup>164</sup> Senator Root opined that Congress could not delegate to the Supreme Court the power to supersede existing statutes. He was of the view, however, that the Clayton bill itself had that effect with respect to the Conformity Act. When his attention was drawn to the situation of federal statutes providing specific procedural directives, Root again relied on repeal by operation of the authorizing statute. His responses suggest that he continued to have the Conformity Act in mind, although in terms they covered the other situation. Taft may have recognized the possibility that they were dissimilar. In order to avoid any constitutional question, he suggested naming the statutes to be repealed *in futuro*. That suggestion was opposed for the reasons invoked earlier. Finally, Representative Floyd vigorously stated his doubts that Congress could constitutionally delegate to the Court the power, by court rules, to repeal prior inconsistent statutes. He was evidently persuaded by Root's argument that Congress could itself do so *in futuro* in the authorizing statute, and he did not distinguish between statutes present to the mind of Congress at the time, such as the Conformity Act, and unidentified and (until rules were promulgated) unidentifiable statutes. See *id.* 29-31, 33, 36-38.

<sup>165</sup> We, by law, provide that the Supreme Court of the United States shall make the rules in relation to the practice. The whole progress and development of our Government is necessarily toward a greater measure of delegation of authority. As our Government becomes more vast and complicated and the problems more difficult to understand, and as more and more duties are imposed upon Congress, it becomes more necessary to delegate more and more. That is the inevitable result of a higher and wider organization.

We can, ourselves, no longer consider and pass upon matters of detail. We delegate to the Interstate Commerce Commission the power to do things which, in the beginning, the legislators and Congress did themselves. And they are dealing with a vast transportation problem with the exercise of exceedingly wide discretion.

And we have just delegated to the Central Reserve Board enormous power in regard to the banking interests of the country. We are now considering a measure for a trades commission, to which, if the bill passes, will necessarily be delegated very broad powers.

It is the inevitable course of the development of government in a growing country that the body which is at the head must deal more and more with the general subjects, and must delegate the particulars more and more to other agencies. It will, in accordance with that inevitable

The 1914 House Report recommended that the Clayton bill be passed with two amendments.<sup>166</sup> Although uniformity of federal and state procedure was not slighted as a goal, inadequate state procedure and the otherwise inadequate federal procedure under the Conformity Act were deemed equally important reasons for reform.<sup>167</sup> In describing the system envisioned by the Clayton bill, the 1914 Report elaborated Shelton's argument that it represented an equable division of power between the Supreme Court and Congress.<sup>168</sup>

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course of development, leave this subject of making rules of practice to the courts which have to administer them.

*Id.* 30; see also *id.* 29-30.

<sup>166</sup> The first extended its application to the district courts of the District of Columbia. H.R. REP. NO. 462, 63d Cong., 2d Sess. 1 (1914) [hereinafter cited as 1914 HOUSE REPORT]; see 1914 *House Hearings*, *supra* note 154, at 23. The second, reflecting the extensive discussion at the hearings, added a new § 2, as follows: "When and as the rules of the court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect." 1914 HOUSE REPORT, *supra*, at 1. In explaining this amendment, the Report reflects the somewhat confusing discussion at the 1914 House Hearings. However, although agreeing with Shelton that the rules would not "have the effect or dignity of statutes or decisions"—indeed, probably for that reason—the Report concluded that an express statutory repeal of inconsistent existing statutes was not only desirable, but "necessary." Compare *id.* 16 with 1914 *House Hearings*, *supra* note 154, at 21-22.

This provision remained essentially unchanged in all subsequent versions of the uniform federal procedure bill, including the version that was enacted in 1934, which provided in § 1: "[Said rules] shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064. It therefore requires a narrow view of the legislative history of the Act to maintain that "[t]he reason for this grant of law revision power is entirely unclear—this provision was simply never discussed in the legislative reports or debates on the Rules Enabling Act." Clinton, *supra* note 13, at 64 (footnote omitted); see *id.* 54 & n.243. Moreover, there is little basis for historical speculation about this provision using 1934 as a point of reference, rather than 1914. See *id.* 74-75. Indeed, when a question was raised about it by a member of Congress in 1938, the secretary of the Advisory Committee on Civil Rules noted its provenance and referred to the 1914 House Report for an explanation of the reasons it was inserted in the uniform federal procedure bill. See letter from Edgar B. Tolman to the Hon. Abe Murdock (March 3, 1938) (copy on file with the *University of Pennsylvania Law Review*).

After the passage of the Act, Professor Sunderland made the argument that the provision for super-statutory effect evidenced "a purpose to confer broad rather than narrow powers." Sunderland, *Character and Extent of the Rule-Making Power Granted United States Supreme Court and Methods of Effective Exercise*, 21 A.B.A. J. 404, 406 (1935). In fact, since only Federal Rules that are otherwise valid under the Act supersede inconsistent federal statutes, it is neutral in that respect. Moreover, it is not irrelevant that the provision was first inserted in a bill the grants of rulemaking authority in which were considerably narrower than those in the Act. For other recent commentary on this provision, see W. BROWN, *supra* note 14, at 98-101.

<sup>167</sup> See 1914 HOUSE REPORT, *supra* note 166, at 7-9.

<sup>168</sup> Analyzed, it means that Congress will delegate to the Supreme Court the power to regulate all detail questions of pleading and procedure and practice; that Congress will retain control over all fundamental and juris-

## 2. Borrowings from the New York Reform Movement

Representative Clayton thought that, in his bill, Congress "pretty well defined what the court may do."<sup>169</sup> That is not a surprising view in light of the bill's specific and restrictive grants of authority to prescribe

the forms and manner of service of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving process of all kinds; of taking and obtaining evidence; drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for the entire pleading, practice, and procedure . . . .<sup>170</sup>

It is more difficult, however, to evaluate Shelton's and the House Judiciary Committee's descriptions of the division of power and responsibility effected by the bill. "Substantive," "jurisdictional," and "fundamental," some of the words used, are not self-defining, and no examples are given.<sup>171</sup> Because the language and concepts of 1914 became standard in the propaganda for, and the legislative characterization of, the uniform federal procedure bill, their origins should be explored.

dictional matters, the production of evidence and, of permanent procedure. In simple words, "Congress will tell the courts what they shall do, but not how they shall do it." This superintendence and regulation will be left exclusively to the Supreme Court.

. . . .

. . . It is in order to say that the new system of rules will preserve all the merit of the common law and of the code procedure. It will occupy a middle state between the two extremes. To that extent it will follow somewhat the present English system that is so much praised, but will possess the advantage of instant improvement by the Supreme Court instead of by annual conference. Another advantage over the English system is that it will contain no substantive law and no matters of jurisdiction or fundamental questions or legislative policy. All of that is reserved to Congress. So simple is the power delegated that the system of rules can go into effect without the change of a single jurisdictional, fundamental, or legislative policy or statute. They touch only the detail operation of the inferior courts in the actual trial of a case and the preparation therefor in the clerk's office.

*Id.* 14-15. For other borrowings from Shelton, compare, e.g., *id.* 2-3 with *Report of the Committee on Uniform Judicial Procedure*, 38 A.B.A. REP. 541, 541-43 (1913).

<sup>169</sup> 1914 *House Hearings*, *supra* note 154, at 37.

<sup>170</sup> H.R. 26,462, 62d Cong., 3d Sess.; S. 8454, 62d Cong., 3d Sess. (1912). For the text of the bill, see *supra* note 154.

<sup>171</sup> Nor are "permanent procedure" or "legislative policy," other concepts invoked in describing the allocation, defined. See *infra* note 185.

a. *The 1912 New York Report*

An early link between the ABA and New York reform movements has been noted.<sup>172</sup> There were some borrowings by both sides at the end of the nineteenth century.<sup>173</sup> They were as nothing, however, compared to the use Shelton and the House Judiciary Committee made of New York materials in discussing the limitations on court rulemaking imposed by the Clayton bill. A Board of Statutory Consolidation had been appointed in New York in 1904.<sup>174</sup> In 1912 it was directed "to report to the next legislature a plan for the classification, consolidation and simplification of the civil practice in the courts of this state."<sup>175</sup> The New York Board's Report, dated December 1, 1912, called for a short practice act, rules of court, and the segregation of substantive law.<sup>176</sup> The question of division of subject matter between practice act and rules of court, which had been a source of controversy and confusion in New York,<sup>177</sup> was answered by remitting to the practice act "the fundamental and jurisdictional matters of

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<sup>172</sup> See *supra* notes 117 & 134.

<sup>173</sup> For instance, the 1896 Report of the ABA's Committee on Uniformity of Procedure and Comparative Law mentioned parallel efforts in New York. See *Committee Report, supra* note 111, at 421-22 (1896). The Committee's original resolution, contained in the report, almost surely was modeled on a New York bill. Compare *id. with id.* 423-24. The 1898 Report of the ABA Committee, which described in some detail and praised the English system, observed that it did not "necessitate the taking from the legislature of any of its functions relative to questions of substantive law or jurisdiction, since it involves the enactment of a statute which shall contain the skeleton of a system of procedure, leaving its development to the courts." *Report of the Committee on Uniformity of Procedure*, 21 A.B.A. REP. 454, 459 (1898). The author of that report was chairman of the New York State Bar Association committees which, in 1898, urged the legislature to pass the legislation that the ABA used as a model and, in 1899, elaborated the division of legislative and judicial responsibility for procedure. See *supra* notes 157 & 174. Thereafter, the New York Association made use of the 1898 ABA Committee's Report. See 22 N.Y. ST. B.A. REP. 175-76 (1899); *Report of the Committee on Law Reform*, 24 N.Y. ST. B.A. REP. 287, 296-97 (1901).

<sup>174</sup> The Board was appointed on the recommendation of the New York Committee of Fifteen. See *supra* note 134; *Report of the Committee on Law Reform*, 26 N.Y. ST. B.A. REP. 351 (1903).

<sup>175</sup> 1912 N.Y. Laws ch. 393, § 1. For the history, see 1 REPORT OF THE BOARD OF STATUTORY CONSOLIDATION ON THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF NEW YORK 5 (1915) [hereinafter cited as 1915 NEW YORK REPORT]; REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE SIMPLIFICATION OF CIVIL PRACTICE 16 (1919) [hereinafter cited as 1919 NEW YORK REPORT].

The Board then included, among others, Adolph J. Rodenbeck, who had been chairman of the Special Joint Committee on Statutory Revision Commission Bills, and William B. Hornblower, who was a member of the ABA's first Committee on Uniform Judicial Procedure. See *supra* note 134; 37 A.B.A. REP. 142 (1912).

<sup>176</sup> See REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK ON A PLAN FOR THE SIMPLIFICATION OF THE CIVIL PRACTICE IN THE COURTS OF THE STATE 7-9 (1912) [hereinafter cited as 1912 NEW YORK REPORT].

<sup>177</sup> See *supra* note 134.

procedure in the Code of Civil Procedure,"<sup>178</sup> and to rules of court "the important details of practice now in the Code of Civil Procedure and in the present court rules."<sup>179</sup> The plan adumbrated was thought to be midway between a legislative system similar to that in existence in New York and a court rule system similar to that in England, and superior to both.<sup>180</sup>

The 1912 Report of the New York Board of Statutory Consolidation attracted attention immediately. Less than four months after it was issued, Roscoe Pound referred to it in reviewing the progress of the idea of reforming procedure by rules of court.<sup>181</sup>

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<sup>178</sup> 1912 NEW YORK REPORT, *supra* note 176, at 7-8.

<sup>179</sup> *Id.* 8. The Report explained:

There are three systems of procedure in common use from which to select: (1) the legislative system or the *statutory idea* of regulating the practice by the legislature leaving to the courts the adoption of rules for the orderly conduct and dispatch of business something like the system in operation in this state although here some details of practice are regulated by court rules, (2) the court rules system or the *English idea* under which only the organization of the courts and jurisdictional matters are prescribed by the legislature and all the rest of the procedure and practice is regulated by stated court rules like the system in vogue in England, and (3) the intermediate procedural system or the advanced *American idea* combining the best features of both of the above mentioned systems and under which jurisdictional and other important matters of procedure are regulated by the legislature and the details of practice are left to court rules similar to the system largely followed in Massachusetts and Connecticut and recently adopted in New Jersey.

*Id.* app. at 23-24.

The Report continued:

The present code system in this state of regulating details of practice by statute has been tried and has so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment.

The English system under which important matters of procedure, which we would regard as fundamental and jurisdictional, are regulated by rules of court is not in harmony with the spirit of our democratic institutions and the principle of checks and balances which is necessary to the preservation of departmental equilibrium under our republican form of government.

The intermediate procedural system which might be called the advanced American system of a legislative act dealing with the important matters of procedure, jurisdictional and otherwise, leaving the details of practice to court rules seems to be the one best suited to the existing conditions in this state.

. . . .

This plan will not disturb the existing procedure upon any fundamental and jurisdictional matter, most of the provisions relating to which have received a settled construction, but will eradicate the evils attaching to the regulation by statute of the details of practice concerning which there is such a universal complaint.

*Id.* app. at 29-30.

<sup>180</sup> See *id.* app. at 29.

<sup>181</sup> See Pound, *Reforming Procedure by Rules of Court*, 76 CENT. L.J. 211, 211 (1913).



Shelton mentioned it in the 1913 Report of the ABA Committee on Uniform Judicial Procedure.<sup>182</sup> Moreover, the influence of the 1912 New York Report on the thinking of Shelton and the House Committee is clear. The words used to describe the scheme of allocation they supported—"substantive," "fundamental," and "jurisdictional"—were taken from the 1912 New York Report.<sup>183</sup> Shelton and the House Committee also shared the Board's view that such a scheme preserved "a due balance between the three departments of government."<sup>184</sup>

The borrowings made by Shelton and the House Committee were problematical for a number of reasons. The 1912 Report of the Board of Statutory Consolidation presented only a framework for procedural reform; it did not elaborate the concepts designed to effect the desired division of functions. Nor were the concepts elaborated by Shelton or the House Committee. Thus, they were espousing an allocation scheme knowing its purposes and abstractions, but not knowing how the creators of the scheme intended to apply those abstractions.<sup>185</sup> Another problem presented by the borrowing was the role, if any, that a practice act—central to the New York scheme—would play in the proposed federal scheme. The Clayton bill authorized rulemaking in designated areas; it was silent as to the rest of the field of procedure.<sup>186</sup> Finally, and more generally, it does not appear that either Shelton or the House

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<sup>182</sup> See *Report of the Committee on Uniform Judicial Procedure*, 38 A.B.A. REP. 541, 543 (1913). The 1912 NEW YORK REPORT, *supra* note 176, was cited even after the 1915 NEW YORK REPORT, *supra* note 175, was issued. See, e.g., *Procedure by Rules of Court*, 1 J. AM. JUDICATURE SOC'Y 77, 77 (1917).

<sup>183</sup> The House Committee referred to "permanent procedure," 1914 HOUSE REPORT, *supra* note 166, at 14, and "legislative policy," *id.* 15, concepts not mentioned, in terms at least, in the 1912 NEW YORK REPORT, *supra* note 176. "Permanent procedure" may have been borrowed from Pound, *see supra* note 140, who seems to have used it generically to describe matters beyond the reach of rules of court. "Legislative policy," *supra* note 168, may have been no more than an alternative formulation of "fundamental question."

<sup>184</sup> 1912 NEW YORK REPORT, *supra* note 176, app. at 35; *see* 1914 HOUSE REPORT, *supra* note 166, at 13; T. SHELTON, SPIRIT OF THE COURTS xxvii-xxix (1918) [hereinafter cited as *SPIRIT OF THE COURTS*]; Shelton, *The Reform of Judicial Procedure*, reprinted in *Hearings Before the House Comm. on the Judiciary on H.R. 2377 and H.R. 90*, 67th Cong., 2d Sess. 28, 33 (1922).

<sup>185</sup> Cf. Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 315 (1978) ("Often when an idea is borrowed those responsible have no direct experience of how well the rule works in practice."). The New York Board did, however, classify a number of matters, including rights of action, limitation of actions, and evidence, as substantive law. *See* 1912 NEW YORK REPORT, *supra* note 176, at 8; *id.* app. at 25.

<sup>186</sup> It is unclear whether the House Committee's observation that the system of rules could "go into effect without the change of a single jurisdictional, fundamental or legislative policy or statute," was intended to speak to this subject. 1914 HOUSE REPORT, *supra* note 166, at 15; *see supra* note 168.

Committee considered the possibility that differences between procedural regulation in New York and in the federal system, both inherent and historical, might render the borrowing inappropriate, even at an abstract level.

Some light was cast on these matters in 1915, when the Board of Statutory Consolidation presented to the New York Legislature a report in three volumes,<sup>187</sup> and a subcommittee of the Senate Judiciary Committee held hearings on a federal practice code.<sup>188</sup>

b. *The 1915 New York Report*

The 1915 New York Report proposed to implement the three-part plan set forth in the 1912 New York Report by specifically allocating some matters to court rules, some to a practice act, and some to separate statutes. The New York Board often used the term "fundamental" to describe matters allocated to the legislature. But the term as used by the Board had two different meanings that were linked to the choice between allocation to the practice act and allocation to separate statutes. In its first meaning, "fundamental" matters signified the "ground work or fundamentals of procedure,"<sup>189</sup> "the main propositions or principles that should govern."<sup>190</sup> The Board placed matters deemed "fundamental" in this sense in the practice act.<sup>191</sup> In its second meaning, "fundamental" was a hedge. The Board used the term "fundamental" in this sense to designate matters that, for the purpose of allocating between legislation and rules of court, were difficult to classify as substantive law or substantive rights, on the one hand, or procedure, on the other, and that, although possibly within the broad rulemaking power of the courts under the New York Constitution, were assigned to the legislature precisely because they were matters thought to present serious questions of power.<sup>192</sup>

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<sup>187</sup> See 1915 NEW YORK REPORT, *supra* note 175. The report was made pursuant to 1913 N.Y. Laws, ch. 713, which was enacted as recommended in 1912 NEW YORK REPORT, *supra* note 176, at 17-19.

<sup>188</sup> *Simplification of Judicial Procedure: Hearings Pursuant to S. Res. 552 Before the Subcomm. of the Senate Comm. on the Judiciary*, 64th Cong., 1st Sess. (1915) [hereinafter cited as 1915 Senate Hearings].

<sup>189</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 168.

<sup>190</sup> *Id.* 173.

<sup>191</sup> "This treatment . . . leaves the field clear for the treatment of the changes in the practice by the practice act, and the details of the practice by the rules of court." *Id.* 167.

<sup>192</sup> See *infra* text accompanying notes 200-02. See also Rodenbeck, *Principles of a Modern Procedure*, 2 J. AM. JUDICATURE Soc'y 100, 102-03 (1918). Rodenbeck was chairman of the Board of Statutory Consolidation, which wrote the 1915 New York Report.

The New York Board recognized that it had "a large discretion" in assigning matters,<sup>193</sup> and it thought that "perhaps such provisions as those relating to rights and limitations of actions" <sup>194</sup> might be placed in the practice act as "matters of a fundamental and jurisdictional nature." <sup>195</sup> But it did not do so. Instead, the New York Board treated matters deemed "fundamental" in the second sense like the substantive law and assigned them to separate statutes. Evidence, rights of action, and limitations of actions, which had been classified as substantive law in the 1912 Report, were so treated.<sup>196</sup> In addition, the Board placed in separate statutes "cases . . . in which an execution may issue against the person and property," <sup>197</sup> cases in which provisional remedies may be applied,<sup>198</sup> and provisions defining the right to a jury trial.<sup>199</sup> In either case the function of the concept was to assign responsibility to the legislature. Only in the case of matters deemed "fundamental" in the second sense, however, was the choice thought to implicate constitutional considerations.

The Board viewed the regulation of procedure as a suitable subject, under the New York Constitution, either for legislation or, in the absence of legislation to the contrary, for rules of court.<sup>200</sup> It reasoned that the courts possessed inherent power to promulgate rules, subject to legislative override and to the limitation that the inherent power "would not extend to the declaration in rules of court of substantive rights which come within the province of the legislative function." <sup>201</sup> Such, in the Board's view, were also the limits that the New York Constitution imposed on the delegation by the legislature of its functions. The Board concluded:

The regulation of procedure embraces matters that are of a very substantial character as affecting rights of person and of property and are suitable subjects of legis-

<sup>193</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 167.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> See 1 1915 NEW YORK REPORT, *supra* note 175, at 165-67; *supra* note 185; see also 3 1915 NEW YORK REPORT, *supra* note 175, at 477-79. Other provisions so treated were costs, fees, disbursements and interest. See 1 *id.* 165-67.

<sup>197</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 423.

<sup>198</sup> See *id.* 438-39; see also 3 *id.* 480-83.

<sup>199</sup> See 3 *id.* 498; see also 1 *id.* 375.

<sup>200</sup> See 1 *id.* 174-77. The Board's discussion relied on *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825); *Beers v. Haughton*, 34 U.S. (9 Pet.) 328 (1835); and *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825).

<sup>201</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 175.

lation where the legislature deems it proper to define them, but they may be regulated by the courts in the exercise of their jurisdiction in the absence of legislation to the contrary.

*The power of the courts, therefore, to enact rules in the absence of restrictive legislation is very broad, covering rights that are of a very substantial character and extends not merely to matters of form and practice, but to matters of substance and procedure and generally whatever is necessary to exercise the jurisdiction conferred upon the courts by the constitution or the legislature and to enforce their orders, decrees and judgments.*

*Nevertheless, in working out the new practice every serious question of power to enact a given provision has been resolved against the courts and explains [sic] why so many provisions formerly in the code have been inserted in substantive statutes.*

The question of power to enact a specific rule rests with the courts and where it is a mere matter of opinion no fine theories or preconceived notions ought to stand in the way of the advancement of a great public reform.<sup>202</sup>

### c. *The 1915 Senate Hearings*

Shelton testified before a subcommittee of the Senate Judiciary Committee in 1915 that the New York Board of Statutory Consolidation had been appointed "to work out an equable division of power between the judicial and legislative departments of government."<sup>203</sup> He also claimed that the plan of the 1915 New York Report was "identical with the American Bar Association's plan," raising again the question of the role of a practice act in the latter.<sup>204</sup> The occasion of his testimony helps to explain that remark and the statement in his 1915 Committee on Uniform Judicial Procedure Report that the ABA's program included "a short practice code":<sup>205</sup> the subcommittee was holding hearings on a proposal for what Shelton referred to as "The Practice Code," contained in a bill passed by the House.<sup>206</sup>

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<sup>202</sup> *Id.* 176-77 (emphasis added).

<sup>203</sup> 1915 *Senate Hearings*, *supra* note 188, at 8.

<sup>204</sup> *Id.*; see *supra* text accompanying note 186.

<sup>205</sup> *Report of the Committee on Uniform Judicial Procedure*, 40 A.B.A. REP. 502, 502 (1915).

<sup>206</sup> The bill was H.R. 15,578, 63d Cong., 2d Sess. (1914), passed by the House on June 17, 1914. 51 CONG. REC. 10,615 (1914). Consideration of the matters contemplated therein by a subcommittee of the Senate Judiciary Committee was authorized by S. Res. 552, 63d Cong., 3d Sess. (1915), *reprinted*

Notwithstanding that a revision of federal statutory law governing procedure was under consideration in 1915,<sup>207</sup> others did not share Shelton's view that the "American Bar Association's plan" and the model elaborated in the 1915 New York Report were "identical." In remarks to the Ohio State Bar Association in July 1915, Roscoe Pound asserted that there were two plans under consideration in New York, one to "turn this matter over entirely to rules of court," which Pound viewed as the ABA plan, and the other "to have a short practice act . . . and then turn the rest over [to rules of court]," which he associated with the 1915 New York Report.<sup>208</sup> Although Pound approved of the 1915 New York Report's discussion of the constitutional issues,<sup>209</sup> he preferred to the plan it recommended the plan he thought was recommended by the ABA.<sup>210</sup>

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in 1915 *Senate Hearings*, *supra* note 188, at 53-54. For the references to "The Practice Code," see *Report of the Committee on Uniform Judicial Procedure*, 40 A.B.A. REP. 502, 504, 506 (1915). In his description of the plan proposed in the 1915 New York Report and the ABA plan, said to be identical, Shelton stated: "It means simply that the Congress shall in the future have absolute control over all fundamental matters, questions of jurisdiction and of permanent procedure and evidence and *such other matters of a permanent nature as those with which you have been dealing to-day*; but that the detailed operation of the courts and their conduct shall be by rules of court, and that those rules may be made and changed from time to time by the Supreme Court . . . ." 1915 *Senate Hearings*, *supra* note 188, at 8 (emphasis added). H.R. 15,578 contained twelve chapters and three hundred and eighty-one sections, as follows: Chapter One (§§ 1-56): District Attorneys, Marshals, Clerks, Commissioners, and Stenographers; Chapter Two (§§ 57-105): Pay and allowances of Court Officers, Jurors, and Witnesses; Chapter Three (§§ 106-165): Evidence; Chapter Four (§§ 166-232): Civil Procedure; Chapter Five (§§ 233-269): Criminal Procedure; Chapter Six (§§ 270-296): Procedure on Error and Appeal; Chapter Seven (§§ 297-334): Judgments, Costs and Execution; Chapter Eight (§§ 335-343): Limitations; Chapter Nine (§§ 344-361): Habeas Corpus; Chapter Ten (§§ 362-376): Extradition; Chapter Eleven (§§ 377-379): General Provisions; Chapter Twelve (§§ 380-381): Repealing Provisions. See H.R. REP. No. 521, 63d Cong., 2d Sess. (1914).

<sup>207</sup> In fact, H.R. 15,778 was nothing like the practice act contemplated in the 1915 New York Report, as the outline *supra* note 206 and Shelton's use of the word "code" suggest. See also *Ninth Annual Report of the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation*, 2 A.B.A. J. 603, 607 (1916). That fact and a review of matters covered by H.R. 15,778 (e.g., evidence, limitations) tends to confirm that Shelton attached only one meaning to the concept of "fundamental" matters, namely those matters that should be assigned to legislation rather than court rules because they raised questions of institutional legitimacy, if not of constitutional power. See *infra* text accompanying note 227.

<sup>208</sup> 36 OHIO ST. B.A. PROC. 40 (1915). Pound had referred to the 1915 New York Report, which had not yet been issued. *Id.* 36.

<sup>209</sup> See Pound, *Regulation of Judicial Procedure By Rules of Court*, 10 ILL. L. REV. 163, 170 n.27 (1915).

<sup>210</sup> Of course jurisdictional lines are fixed by constitutions and statutes. These matters will never be left and ought not to be left to rules of court. Beyond that, however, I find it difficult to perceive any real advantage in the plan adopted in New Jersey and recommended in New York. It

### 3. Senator Walsh Opposes the Uniform Federal Procedure Bill

The 1915 Senate Hearings were also the occasion of the first public debate between Shelton and Senator Thomas J. Walsh of Montana on the issue of uniform federal procedure. Walsh had doubts about and objections to the Clayton bill that had led him to prevent the report of the bill.<sup>211</sup> He was concerned both that uniform federal procedure would cause inconvenience to the many lawyers who would be unfamiliar with rules different from those applied in their state courts and that a host of interpretive problems would be created by the new system.<sup>212</sup> He feared that the combination of practitioner unfamiliarity and interpretive problems would result in numerous mistakes. Walsh was curious about the process that would be used to obtain amendments to rules promulgated by the Supreme Court—which he regarded as legislation—and doubted that the Justices, overburdened, conservative, and far removed from the trial of cases, would change them.<sup>213</sup> Thus, Walsh sided with what he considered to be the interests of most lawyers, who practiced only in their home state, by advocating federal conformity to state procedure. He declared himself “for

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is just as difficult to frame supposed essential principles *a priori* as it is to lay down details *a priori*. Amendment will be as inevitable in the one case as in the other. In each case the rule ultimately should be shaped as a result of judicial experience of how it works in practice.

*Id.* 176. For Pound's earlier views, see *supra* text accompanying notes 139-40.

Pound was joined in this preference by Professor Hudson, who, however, suggested that a statutory framework would be acceptable “for a beginning and until the general acceptance of the principle of judicial control has been vindicated by success.” Hudson, *The Proposed Regulation of Missouri Procedure by Rules of Court*, 17 U. MO. BULL. 3, 28 (1916). See also Morgan, *Judicial Regulation of Court Procedure*, 2 MINN. L. REV. 81, 96 (1918), where the author endorsed the ABA's proposal, which he believed favored “the Colorado plan of entrusting the entire subjects of pleading and practice to the courts, rather than the New Jersey plan of having the legislature prescribe the general principles and outline, leaving only the details to the courts.” Morgan did not classify the plan contained in the 1915 New York Report, perhaps because he was then describing the “movement for control of court procedure by rules of court” generally. *Id.*

After the passage of the 1934 Act, the Secretary of the Advisory Committee noted that Congress had gone “beyond the scope of the canon of procedural reform” that Pound had prepared for the ABA Committee of Fifteen in 1910. Tolman, *Improvement of Court Procedure*, 61 A.B.A. REP. 432, 436 (1936); see *supra* text accompanying notes 131 & 137.

<sup>211</sup> 40 A.B.A. REP. 32 (1915); see 1915 *Senate Hearings*, *supra* note 188, at 27-28.

<sup>212</sup> See 1915 *Senate Hearings*, *supra* note 188, at 21, 27-28.

<sup>213</sup> See *id.* 23-25, 28.

the one hundred who stay at home as against the one who goes abroad." <sup>214</sup>

Shelton was not responsive to Walsh's questions at the 1915 Senate Hearings <sup>215</sup> and overreacted to the latter's suggestion that uniform federal procedure would benefit only an elite minority of the bar.<sup>216</sup> Thereafter, Shelton became progressively critical of Walsh's opposition to the reform,<sup>217</sup> addressing Walsh's arguments in a patronizing manner.<sup>218</sup> In early 1917 the Senate Judiciary Committee issued a report that appeared to recommend passage of the uniform federal procedure bill.<sup>219</sup> The putative "majority report" <sup>220</sup> added little to the 1914 House Report which it specifically adopted. The "Views of the Minority," actually signed by a majority of the Committee, elaborated Walsh's objections at the 1915 Senate Hearings and suggested that Congress could not constitutionally delegate the power to make supervisory rules of procedure.<sup>221</sup> But because of the long history of Congress's acquiescence in the Supreme Court's promulgation of Equity Rules, Walsh pressed the argument only to the extent of suggesting that a

<sup>214</sup> *Id.* 28.

<sup>215</sup> See *id.* 9-13.

<sup>216</sup> See *id.* 28-29; Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916); SPIRIT OF THE COURTS, *supra* note 184, at 195-96, 198-99.

<sup>217</sup> See, e.g., Shelton, *Progress of the Proposal to Substitute Rules of Court for Common Law Practice*, 5 VA. L. REV. 111, 120 (1917); SPIRIT OF THE COURTS, *supra* note 184, at 96; 43 A.B.A. REP. 87 (1918); 48 A.B.A. REP. 114-15 (1923); 49 A.B.A. REP. 96-97 (1924); 51 A.B.A. REP. 119-22 (1926). In 1922 Walsh complained: "The discussion, so far as it has referred to opposition in this committee, has had a personal tinge, and that is a thing that I feel at liberty to speak of. I am supposed to be the evil genius who has stood in the way of the enactment of this measure." *Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 2d Sess. 15 (1922). Walsh's perception of a "personal tinge" may have been sharpened by a resolution passed by the ABA's Executive Committee at its 1922 mid-winter meeting. See *Report of the Committee on Uniform Judicial Procedure*, 47 A.B.A. REP. 370, 371 (1922).

<sup>218</sup> See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921). Following the passage of the Rules Enabling Act of 1934, Attorney General Cummings was fond of contrasting his way with the Congress with that of the ABA, and attributing the difference in results obtained to the difference in styles. See, e.g., Cummings, *Remarks*, in PROCEEDINGS OF THE WASHINGTON, DC INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE 19, 20 (1938), reprinted in 24 A.B.A. J. 885 (1938). See also Clark, *The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A. J. 22, 22 (1939).

<sup>219</sup> S. REP. NO. 892, 64th Cong., 2d Sess. 1 (1917) [hereinafter cited as 1917 SENATE REPORT].

<sup>220</sup> Subsequently, Senator Walsh explained that a majority of the members of the Judiciary Committee ultimately signed the statement of the "Views of the Minority," *id.* pt. 2, one member having "changed his attitude upon a more careful study of the question, reversing the position of the Committee." S. REP. NO. 1174, 69th Cong., 1st Sess. 23 (1926) (Minority Views); see Walsh, *Senator Walsh Replies*, 12 A.B.A. J. 651 (1926).

<sup>221</sup> See 1917 SENATE REPORT, *supra* note 219, pt. 2, at 6-8.

"new departure" should be scuttled and that reform should proceed, if at all, by direct action of Congress.<sup>222</sup>

#### 4. Clarification and Change in the ABA Plan and the Uniform Federal Procedure Bill: The Sutherland Bill

It was mistakenly reported at the 1916 ABA annual meeting that the uniform federal procedure bill had been passed by both houses of Congress.<sup>223</sup> In fact, a reading of the 1915 Senate Hearings and the 1917 Senate Report makes clear that early predictions of a campaign quickly concluded had been naïve. Nonetheless, the calls for passage of the ABA's bill, and for regulation of procedure by rules of court in the states, increased, particularly in the literature.<sup>224</sup>

One item published in this period is of special interest. In 1918, Shelton's book, *Spirit of the Courts*, was published. Consisting in the main of addresses made by the author between 1912 and 1917, the work described the ABA's program in, by then, familiar but still largely undefined terms.<sup>225</sup> Shelton did, however, clarify his view as to the role of a practice act in the ABA scheme. He maintained that, because the ABA bill would not involve the alteration of procedure "upon any jurisdictional or fundamental matter," the preparation of a practice act to deal with those matters was "a subject entirely apart" from the adoption of the uniform federal procedure bill.<sup>226</sup> He also suggested that the exclusion

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<sup>222</sup> *Id.* 9.

<sup>223</sup> See *Report of the Committee on Uniform Judicial Procedure*, 3 A.B.A. J. 521, 521 (1917).

<sup>224</sup> See, e.g., Shelton, *supra* note 217; Clayton, *Uniform Federal Procedure*, 84 CENT. L.J. 5 (1917) (the author was the author of the Clayton bill, set forth *supra* note 154); Morgan, *supra* note 210; Scott, *The Progress of the Law, 1918-1919, Civil Procedure*, 33 HARV. L. REV. 236, 236-38 (1919); *Is Congress Obstructing Reform in Judicial Procedure?*, 90 CENT. L.J. 40 (1920); Shelton, *Campaign for Modernizing Procedure*, 7 A.B.A. J. 165 (1921). In 1917, the American Judicature Society began publishing its *Journal*, from the start a constant and outspoken ally of both the federal and the national movements for regulation of procedure by rules of court. See, e.g., *Procedure Through Rules of Court*, J. AM. JUDICATURE SOC'Y, June 1917, at 17; *Senate Committee Gone Astray*, J. AM. JUDICATURE SOC'Y, Aug. 1917, at 17; *Procedure by Rules of Court*, J. AM. JUDICATURE SOC'Y, Oct. 1917, at 77; *Thomas W. Shelton's Book*, 2 J. AM. JUDICATURE SOC'Y 91 (1918); Rodenbeck, *supra* note 192; *Editorial*, 4 J. AM. JUDICATURE SOC'Y 163 (1920).

<sup>225</sup> *SPIRIT OF THE COURTS*, *supra* note 184, at xxiv-xxv, xxviii-xxix, 105, 130.

<sup>226</sup> *Id.* xxv. From the start, Shelton had been concerned that the uniform federal procedure bill would be delayed by the proposed federal practice code. See 1915 *Senate Hearings*, *supra* note 188, at 16. In 1916 he stated that he was unwilling to "complicate" the uniform federal procedure bill with the proposed federal practice code, because the latter was under the consideration of another ABA committee and would require some time for passage. See *Report of the Committee*



of "fundamental and jurisdictional matter[s]" from court rule-making was required by "the spirit of our republican institutions," if not by "the basic constitutional principles in which they rest."<sup>227</sup> For Shelton, then, "fundamental" had only the second of the two meanings evident in the 1915 New York Report: Shelton used "fundamental" to refer only to those matters which raised questions of institutional legitimacy, if not of constitutional power, and thus should be assigned to legislation rather than to court rules.

The bill reported by Senator Sutherland for the Senate Judiciary Committee in 1917 and promoted by the ABA from 1919 until 1924 was somewhat different from the Clayton bill.<sup>228</sup> Two of the changes were patently a matter of reorganization.<sup>229</sup> Two others may not so easily be dismissed. The first of these was in the general authorizing clause. The Clayton bill had extended

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on *Uniform Judicial Procedure*, 2 A.B.A. J. 657, 658 (1916). The proposed federal practice code did not become law. See 3 A.B.A. J. 509 (1917); 4 A.B.A. J. 502 (1918).

<sup>227</sup> SPIRIT OF THE COURTS, *supra* note 184, at xxviii. The words first quoted in the text were taken from the 1912 New York Report. See *supra* text accompanying note 183. See also Shelton, *supra* note 184, at 33.

<sup>228</sup> Compare *Report of the Committee on Uniform Judicial Procedure*, 39 A.B.A. REP. 571-72 (1914) with S. 4551, 64th Cong., 1st Sess. (1916), reprinted in 1917 SENATE REPORT, *supra* note 219, at 1. The new language was quoted in Morgan, *supra* note 210, at 82 (January, 1918), but not in the Reports of the Committee on Uniform Judicial Procedure until 1919. Compare, e.g., 4 A.B.A. J. 519, 523 (1918) with *Report of the Committee on Uniform Judicial Procedure*, 5 A.B.A. J. 468, 475 (1919). The uniform federal procedure bill, as reflected in ABA and Congressional reports, and as modified in 1914 and 1916, is set forth below. Phrases in brackets ([ ]) were added in 1914. Phrases in carets (< >) were added in 1916. Phrases in starred parentheses ( \* ( ) \* ) were deleted in 1916.

*Be it enacted*, etc., That the Supreme Court shall have the power to prescribe, from time to time and in any manner, the forms \* (and manner of service) \* of writs and all other process; the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving < writs and > process of all kinds; of taking and obtaining evidence; drawing up, entering, and enrolling orders; and generally to regulate and prescribe by rule the forms for < and the kind and character of > the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law of whatever nature by the district courts of the United States [and the District of Columbia]. < That in prescribing such rules the Supreme Court shall have regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits. >

[Sec. 2. < That > when and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force and effect.]

The bill in this form will hereafter be referred to as the Sutherland bill.

<sup>229</sup> See the first deletion and addition in the composite set forth *supra* note 228.

the Court's general authority to make rules only to "*the forms for the entire pleading, practice and procedure to be used in all actions, motions and proceedings at law . . .*" The Sutherland bill extended general authority to "*the forms for and the kind and character of the entire pleading, practice, and procedure to be used in all actions, motions, and proceedings at law . . .*" The second change worth noting was the addition of a provision requiring the Supreme Court, when prescribing rules, to have "regard to the simplification of the system of pleading, practice, and procedure in said courts, so as to promote the speedy determination of litigation on the merits."<sup>230</sup>

Neither of these changes was discussed in the literature. As was his wont, Shelton ignored them when describing the ABA's campaign.<sup>231</sup> But it is difficult to escape the conclusion that the general grant in the Sutherland bill conferred greater authority on the Court than it would have had under the Clayton bill and that this grant of enhanced power was tied to the stated objective of simplification. Finally, the history indicates that the changes were consistent with, albeit apparently not prompted by,<sup>232</sup> refinements in theory in the reform movement nationally. The purer rules of court system favored by Pound and others must have seemed more attractive for the federal system, if only for practical reasons, once the magnitude of the task reserved for the legislature under a system like that proposed in New York, and the difficulty of securing congressional action on a practice act, became clear.

In 1919, when the ABA Committee on Uniform Judicial Procedure incorporated changes in the uniform federal procedure bill, it also began to issue more elaborate reports.<sup>233</sup> The process was essentially complete by the following year.<sup>234</sup> From 1920

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<sup>230</sup> See *supra* note 228. Compare the second change with the 1842 act, *supra* note 103.

<sup>231</sup> For example, the 1921 Report of the Committee on Uniform Judicial Procedure stated that the bill set forth in Appendix A to that report was "the same bill that has been introduced regularly for nine years." 46 A.B.A. REP. 461, 464 (1921). In fact the bill, *id.* 470, was the 1916 version, with the changes noted *supra* note 228. See also *infra* text accompanying note 277; *Report of the Committee on Uniform Judicial Procedure*, 49 A.B.A. REP. 483, 490 (1924). But see 49 A.B.A. REP. at 95.

<sup>232</sup> The 1917 SENATE REPORT, *supra* note 219, at 5-6, made no distinction among the systems in place in New Jersey, Colorado, and Virginia.

<sup>233</sup> See *Report of the Committee on Uniform Judicial Procedure*, 5 A.B.A. J. 468 (1919).

<sup>234</sup> See *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509 (1920).

through 1929,<sup>235</sup> the core of the ABA Committee's annual report remained the same from year to year. Developments in the year past were reported, but the structure and the arguments of most of the report were identical.<sup>236</sup> Of particular interest is the section entitled "An Analysis of the Effect of the Statute":

The trouble with the procedure of the courts is due to the fact that coordination between these two departments of government has been destroyed by exclusive legislative control. The proposed bill would vest in the Supreme Court the exclusive power to prepare for the trial courts all necessary rules and regulations and gradually perfect them. *It divides all judicial procedure into two classes, viz.: (a) jurisdictional and fundamental matters and general procedure and (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter.* The first class goes to the very foundation of the matter and may aptly be denominated the legal machine through which justice is to be administered, as distinguished from the actual operation thereof and lies exclusively with the legislative department. It prescribes what the courts may do, who shall be the parties participating, and fixes the rules of evidence and all important matters of procedure. The second concerns only the practice, the manner in which these things shall be done, that is the details of their practical operation. Concisely stated, the first or legislative class provides what the courts may do, while the second or judicial class regulates how they shall do it. *It is desired to be emphasized that the statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter; that the Congress can repeal it at its pleasure and that the proposed rules will not have the effect of a statute.*<sup>237</sup>

<sup>235</sup> The 1927 Report departed from the standard format. See *Report of the Committee on Uniform Judicial Procedure*, 52 A.B.A. REP. 396 (1927). The reason for the departure is explained in *id.* 397.

<sup>236</sup> The post-1920 reports of the Committee on Uniform Judicial Procedure included identical sections, in the same order, entitled, with minor variations: "The Purpose of the Bill"; "The Only Legislation Needed. The Bench and the Bar Will Do the Rest."; "The Origin and End of Conformity (Sec. 914 R.S.)"; "A Reply to Certain Objections"; "There Will Be Little To Learn"; "The Small Practitioner Will Profit"; "Uniformity Will Be Made Possible and Attractive"; "The Benefits To Be Derived"; "An Analysis of the Effect of the Statute"; "Post Bellum Court Burdens"; and "The Judicial Section." All citations for material in these sections are to the 1920 Report.

<sup>237</sup> *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 517 (1920) (emphasis added).

### E. *The Critical Years: 1922-1930*

The uniform federal procedure bill was completely rewritten and, in at least one respect, substantially revised, in the first two years of the ABA campaign's second decade. The new version received detailed consideration in a legislative hearing and legislative reports, as well as in the literature, during the 1920's. For some, the changes were of no consequence. For others, they provided fertile ground for objection. The debate about the bill, reflecting these attitudes, was at times remarkably similar to, and at times rather different from, that which attended prior incarnations. As in the past, the supporters of the bill looked to New York for assistance in defining its limitations.

#### 1. The 1922 House and Senate Hearings on the Sutherland Bill

Before the changes were made, hearings were held on the Sutherland bill in both the House<sup>238</sup> and the Senate.<sup>239</sup> They added very little new to the arguments in favor of or against the proposed legislation. In his testimony before the House Judiciary Committee, Shelton endorsed the suggestion made by Chief Justice Taft in a 1922 speech to the Chicago Bar Association<sup>240</sup> that, in formulating rules, the Supreme Court would consult a committee of the bench and bar.<sup>241</sup> In a statement made at the Senate Hearing, Senator Walsh argued that the asserted success of rulemaking in England did not guarantee its success in this country, where far-flung states "have very different ideas about the kind of procedure that they desire to follow."<sup>242</sup>

#### 2. Chief Justice Taft Proposes Merged Law and Equity Procedure

Taft's Chicago speech contained another, far more dramatic suggestion than the one cited by Shelton. Invoking the experi-

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<sup>238</sup> *Procedure in the Federal Courts, Hearings on H.R. 2377 and H.R. 90 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 32 (1922) [hereinafter cited as 1922 House Hearings].

<sup>239</sup> *Simplification of Judicial Procedure in Federal Courts, Hearings on S.1011, 1012, 1546, 2610, and 2870 Before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 2d Sess. (1922) [hereinafter cited as 1922 Senate Hearings].

<sup>240</sup> See Taft, *Three Needed Steps of Progress*, 8 A.B.A. J. 34 (1922).

<sup>241</sup> *Id.* 35; see 1922 House Hearings, *supra* note 238, at 5, 12. In his testimony, Shelton also predicted that there would be no difference in the form of procedure at law and in equity under the rules authorized by the bill. *Id.* 6.

<sup>242</sup> 1922 Senate Hearings, *supra* note 239, at 18.

ence in England, Taft had recommended not only that the Court be given the same power to make rules at law as it had in equity but also that it be given the power "to blend them into a code, which [would] make the procedure the same in all and as simple as possible."<sup>243</sup> Taft developed his suggestion in a subsequent speech delivered at the ABA's annual meeting in 1922.<sup>244</sup> After describing at length the system of procedural regulation in England and his personal observations of that system in action,<sup>245</sup> he made a concrete proposal in which English influence was apparent:

What I would suggest is that Congress provide for a commission, to be appointed by the President, of two Supreme Court justices, two circuit judges, two district judges, and three lawyers of prominence and capacity to prepare and recommend to Congress amendments to the present statutes of practice and the judicial code, authorizing a unit administration of law and equity in one form of civil action. The act should provide for a permanent commission similarly created, with power to prepare a system of rules of procedure for adoption by the Supreme Court. Power to amend from time to time should also be given. The rules and their amendments, after approval by the court, should be submitted to Congress for its action, but should become effective in six months, if Congress takes no action . . . .<sup>246</sup>

The ABA immediately adopted a resolution calling on Congress to pass legislation implementing Taft's proposal.<sup>247</sup> At Shelton's suggestion, the matter was left to the Committee on Uniform Judicial Procedure.<sup>248</sup> In pursuing Taft's proposal,<sup>249</sup> however,

<sup>243</sup> Taft, *supra* note 240, at 35. In this speech, Taft replied to the objection that uniform federal procedure introducing a new system would create hardship for lawyers, arguing that "the plan is to make the system so simple that it needs no special knowledge to master it." *Id.* He described the allocation between Congress and the Court as follows: "Congress can lay down the fundamental principles that should govern and then the court can fill out the details." *Id.*

<sup>244</sup> See Taft, *Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 47 A.B.A. REP. 250 (1922), reprinted in 8 A.B.A. J. 601 (1922).

<sup>245</sup> See 47 A.B.A. REP. at 260-67.

<sup>246</sup> *Id.* 268; see *id.* 260 ("Of course the present statutes governing a separate administration of law and equity must be amended or revised by Congress, and certain general requirements be declared, but the main task of reconciling the two forms of procedure can be best effected by rules of court.").

<sup>247</sup> See 47 A.B.A. REP. at 32-33.

<sup>248</sup> See *id.* 82; *Report of the Committee on Uniform Judicial Procedure*, 48 A.B.A. REP. 343, 343-44 (1923).

<sup>249</sup> Shelton reported that the bill prepared by the committee had been introduced in the House and Senate but that no action had been taken by the

Shelton's Committee construed its mandate more restrictively than either the proposal itself or the ABA resolution suggests was appropriate. Taft's proposal called for the authorization of rule-making in the same act that would establish a commission to recommend legislation leading to "a unit administration of law and equity." It also contemplated a permanent commission to take first-line responsibility in the rulemaking enterprise. The ABA Committee's bill was silent as to both matters,<sup>250</sup> and Shelton continued to promote the Sutherland bill.<sup>251</sup> Uniformity of procedure at law and merger with equity procedure were thus, although only for a short time, parallel but separate efforts.<sup>252</sup>

### 3. Senator Cummins and Chief Justice Taft Rewrite the Uniform Federal Procedure Bill

In July 1923, Shelton went to work on Senator Albert B. Cummins of Iowa, seeking to persuade him to change his mind about the uniform federal procedure bill. Cummins had been part of the "minority" in the 1917 Senate Report<sup>253</sup> and was reported to be "resolutely opposed to the measure, as he ever was," by Senator Walsh during the 1922 Senate Hearing.<sup>254</sup> Using a mutual friend's introduction, Shelton wrote to Cummins with "a suggestion that may help to bridge over the gap and give to the people that to which they are entitled from their legislators and lawyers."<sup>255</sup> The suggestion, reflected in a revised version of the

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Judiciary Committee of either. See 48 A.B.A. REP. at 344; see also Potts, *Unification of the Judiciary*; A Record of Progress, 2 TEX. L. REV. 445, 458 app. (1924).

<sup>250</sup> See 48 A.B.A. REP. at 344.

<sup>251</sup> See *id.* 345.

<sup>252</sup> Commentators have ignored this interlude. See, e.g., Clark, *supra* note 36, at 449; Clark, *Procedural Reform*, *supra* note 41, at 146-47; Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUDICATURE SOC'Y 250, 250-51 (1963); Clark & Moore, *supra* note 36, at 388-89; Ilse, *supra* note 158, at 213; Sunderland, *supra* note 36, at 1120, 1124; *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, *supra* note 41, at 102; cf. Chandler, *supra* note 41, at 481 (noting reference in 1922 to a bill to be introduced but suggesting that it was the Cummins bill).

Assuming these actions can properly be attributed to Shelton, his reasons for departing from Taft's scheme, which had been endorsed by the ABA, are unclear. It may be that, as in 1916, he was unwilling to "complicate" the uniform federal procedure bill with other legislation, particularly legislation that prior experience indicated could well be controversial. See *supra* note 226. Moreover, he believed that something close to merger could be achieved without any authorization or legislation specifically directed to that end. See *supra* note 241.

<sup>253</sup> See *supra* note 220.

<sup>254</sup> 1922 Senate Hearings, *supra* note 239, at 15.

<sup>255</sup> Letter from Thomas W. Shelton to the Hon. Albert B. Cummins (July 25, 1923) (William Howard Taft Papers, Library of Congress, Washington, D.C.,

Sutherland bill that Shelton enclosed, was that the rules for actions at law be prepared by a commission such as Taft had recommended for a merged system of law and equity. In addition, Shelton adopted Taft's proposal that, following approval by the Supreme Court, the rules be submitted to Congress and become effective six months after submission absent congressional action.<sup>256</sup>

Shelton kept the Chief Justice informed about his suggested "compromise between the Senate Judiciary Committee and the Bar Association," noting that "[t]he most powerful personal influence ha[d] been brought to bear on Senator Cummins."<sup>257</sup> Cummins replied to Shelton that he was "in hearty sympathy" with the goal and that he saw "no difficulty in reaching a satisfactory conclusion."<sup>258</sup> Thereafter, in December 1923, Cummins held separate meetings with Justice (former Senator) Sutherland and Chief Justice Taft. After returning from his conference with Taft, Cummins redrafted the bill and sent almost identical letters to the two Justices, enclosing his draft, explaining what he had done and why, and seeking their comments. Cummins' draft provided:

Section 1. The Supreme Court of the United States shall have the power to prescribe by general rules, for the District Courts of the United States and for the courts of

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reel 255 [hereinafter cited as Taft Papers]); *see also* letter from Chas. A. Snyder to the Hon. Albert B. Cummins (July 26, 1923) (Taft Papers, *supra*, reel 255); letter from the Hon. Albert B. Cummins to Chas. A. Snyder (July 31, 1923) (Taft Papers, *supra*, reel 255).

<sup>256</sup> *See* letter from Thomas W. Shelton to the Hon. Albert B. Cummins, *supra* note 255 (with enclosure). Section 3 of the bill Shelton proposed provided: "Such system of rules and all amendments thereto shall be submitted to Congress for its action, and shall become effective in six months after such submission, if Congress shall take no action thereon." Note that Shelton's proposal did not include a provision for merger of law and equity procedure. *See supra* note 252. *But see* Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 448 (1936) ("Abolition of conformity and union of law and equity were perhaps the two important objectives most stressed by the American Bar Association to be achieved by the court under the rulemaking authority contained in the bill which became the Act of 1934.").

<sup>257</sup> Letter from Thomas W. Shelton to the Hon. William H. Taft (July 26, 1923) (Taft Papers, *supra* note 255, reel 255). At a later time, in an open letter to the ABA, Senator Walsh suggested that Cummins changed his position on the uniform federal procedure bill because of repeated endorsements by the ABA and because his state bar association had endorsed it. *See* Walsh, *supra* note 220; *see also* S. REP. NO. 1174, 69th Cong., 1st Sess. 26-27 (1926) (Minority Views).

<sup>258</sup> Letter from the Hon. Albert B. Cummins to Thomas W. Shelton (August 4, 1923) (Taft Papers, *supra* note 255, reel 255). In his July 31 letter to Chas. A. Snyder, *see supra* note 255, Cummins expressed himself in "complete accord with Mr. Shelton respecting the object he has in view," adding that "[t]he only differences which have arisen are largely matters of form which I am sure can be reconciled without difficulty."

the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation and thereafter all laws in conflict therewith shall be of no further force or effect.<sup>259</sup>

Cummins explained that he had attempted to put the bill "in the fewest possible words," and he requested that the Justices take particular note of the second sentence:

Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.

This sentence, Cummins suggested, was designed to emphasize the fact that "Congress could not if it wanted to, confer upon the Supreme Court, legislative power," and hence "to quiet the apprehensions of those who may be opposed to any measure of this sort."<sup>260</sup>

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<sup>259</sup> Letter from the Hon. Albert B. Cummins to the Hon. William H. Taft (December 17, 1923) (Taft Papers, *supra* note 255, reel 259) (enclosure).

<sup>260</sup> The full text of the letter to Taft follows:

December 17, 1923

My dear Chief Justice:

Since my conference with you this morning, I have attempted to put in the fewest possible words, the bill intended to accomplish simplification and uniformity in the pleadings, practice, and procedure in actions at law. I am sending a copy to you for your consideration and comment. I hope you will particularly note the sentence reading:

"Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

I hope you will not think that I overlooked the obvious principle that Congress could not if it wanted to, confer upon the Supreme Court, legislative power. I have suggested this sentence solely to quiet the apprehensions of those who may be opposed to any measure of this sort.

Yours cordially,  
(signed) Albert B. Cummins

Honorable William H. Taft, Chief Justice,  
Supreme Court of the United States,  
Washington, D.C.

The letter to Sutherland was identical, with the exception of the first sentence, which read in pertinent part: "Since my conference with you the other day and a later one had with the Chief Justice this morning, I have put in the fewest possible words, a bill intended to accomplish uniformity and simplicity . . ." Letter from the Hon. Albert B. Cummins to the Hon. George Sutherland (December 17, 1923) (A.B. Cummins Papers, Iowa State Historical Department, Des Moines [hereinafter cited as Cummins Papers]). I am grateful to the Iowa State Historical Department, Division of Historical Museum and Archives, for permission to copy and make direct quotations from correspondence in the papers of Senator Albert B. Cummins. The letter to Taft, together with Cummins' draft bill, are in



Taft reported his conversation with Cummins to Shelton, indicating that Cummins had asked him to provide "one or two suggestions as to the union of equity and law and the saving of the jury rights under the Constitution in such an arrangement," and that Taft was "going to prepare a little something for [Cummins] for that."<sup>261</sup> Upon receipt of Cummins' letter and draft, Taft replied that Cummins' "proposed bill [was] much better than the one submitted to [Cummins by Shelton]" but expressed the hope that Cummins would "add a section to [his] bill like the one enclosed."<sup>262</sup> Taft proposed a second section of the bill, as follows:

Section 2. The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both, provided, however, that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.<sup>263</sup>

As to the proposed addition, Taft called Cummins' attention to his opinion in *Liberty Oil Co. v. Condon National Bank*,<sup>264</sup> and to the distinction he drew between the provisions for effectiveness of law rules under section 1 and of united rules for law and equity under section 2. It was Taft's purpose in drafting section 2 to give "Congress a chance to amend or reject [united rules] before they go into effect."<sup>265</sup>

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the Taft Papers, *supra* note 255, reel 259. The letter but not the draft bill are in the Cummins Papers, *supra*.

<sup>261</sup> Letter from the Hon. William H. Taft to Thomas W. Shelton (December 17, 1923) (Taft Papers, *supra* note 255, reel 259).

<sup>262</sup> Letter from the Hon. William H. Taft to the Hon. Albert B. Cummins (December 18, 1923) (Taft Papers, *supra* note 255, reel 259).

<sup>263</sup> Letter from the Hon. William H. Taft to the Hon. Albert B. Cummins, *supra* note 262 (enclosure).

<sup>264</sup> 260 U.S. 235 (1922). In his opinion for the Court in this case, Chief Justice Taft stated that "Congress, we think, was looking toward . . . a union of law and equity actions" in the enactment of provisions permitting the amendment of pleadings from law to equity and from equity to law and the interposing of equitable defenses in actions at law. 260 U.S. at 243. See *supra* note 156.

<sup>265</sup> Letter from the Hon. William H. Taft to the Hon. Albert B. Cummins, *supra* note 262. Under § 1, rules for actions at law would go into effect six months after their promulgation by the Court and were not required to be sub-

Cummins thought Taft's proposed second section was "all-right but [that] it could easily be omitted if it [was] an obstacle in the way."<sup>266</sup> He resisted, however, the suggestion of a commission, as well as other suggestions, made by Shelton.<sup>267</sup> Early in 1924, Cummins introduced the bill, S. 2061, exactly as he and Taft had drafted it.<sup>268</sup>

mitted to Congress. Under § 2 as drafted by Taft, however, united rules were required to be reported to Congress "at the beginning of a regular session thereof" and would not be effective "until after the close of such session." Of course, in either case Congress could pass legislation preventing rules from taking effect. See *infra* note 268.

Taft emphasized to Shelton that he deemed the addition of the second section "very important." Letter from the Hon. William H. Taft to Thomas W. Shelton (December, 1923) (Taft Papers, *supra* note 255, reel 259). He evidently contemplated, however, that a merged system of rules would occur "at a later day," that is, after rules had been promulgated "for the common law side of the District Courts." Letter from the Hon. William H. Taft to the Hon. George Sutherland (January 29, 1924) (Taft Papers, *supra* note 255, reel 260).

<sup>266</sup> Letter from the Hon. Albert B. Cummins to Thomas W. Shelton (December 19, 1923) (Taft Papers, *supra* note 255, reel 259). In addition, Cummins expressed the view that his bill would "accomplish the purpose and . . . [might] obviate some of the objections [he had] heard." *Id.*

<sup>267</sup> See letter from Thomas W. Shelton to the Hon. William H. Taft (December 26, 1923) (Taft Papers, *supra* note 255, reel 259) ("He fought the Commission idea from the jump."). In a letter to Taft written in early January 1924, Shelton attributed Cummins' opposition to the latter's perception that a conflict would arise if power were vested in both a commission and the Court. According to Shelton, Cummins also argued that the Court should select the Commission. Shelton left open, however, the possibility that Cummins would revive the idea if his bill encountered "stiff opposition" without it. Letter from Thomas W. Shelton to the Hon. William H. Taft (January, 1924) (Taft Papers, *supra* note 255, reel 260).

Shelton also suggested that Cummins include "the bankruptcy, and Circuit Court of Appeals." Letter from Thomas W. Shelton to the Hon. Albert B. Cummins (December 29, 1923) (Taft Papers, *supra* note 255, reel 259). Moreover, he stated: "While the Chief Justice would agree to the taking effect of the unit plan after it had lain in Congress through a session, we would like for it to go along with your bill [i.e., to become effective six months after promulgation]." *Id.* Cummins evidently adopted the provision regarding effectiveness from Shelton's proposed bill. See *supra* note 256 and accompanying text. Shelton, in turn, had borrowed it from Taft's 1922 ABA speech. *Id.*

<sup>268</sup> See 65 CONG. REC. 1074 (1924). The bill, S. 2061, 68th Cong., 1st Sess. (1924), provided:

A Bill to give the Supreme Court of the United States authority to make and publish rules in common-law actions.

*Be it enacted* . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided*, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved

to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

The bill in this form will hereinafter be referred to as the "Cummins bill," although it might as well be referred to as the Cummins/Taft bill.

At the 1924 ABA annual meeting, Shelton stated: "Senator Cummings [sic], of Iowa, told us at the beginning of the coming session he and Senator Shortridge would vote for this bill, and in fact that Senator Cummings [sic] would introduce it, as he did, with one or two little changes. We made one or two changes upon the recommendation of the Chief Justice and one or two of our committee, Mr. Lehmann and others." 49 A.B.A. REP. 95 (1924). This is inaccurate.

In 1927, Shelton asserted: "[T]he second section which does merge the equity and law was added to the bill by the Senate itself. It was put in there by Senator Poindexter when he was in the Senate." 52 A.B.A. REP. 124 (1927). Poindexter had been a supporter of the uniform federal procedure bill for a number of years. See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 462 (1921). But this is an intentional misrepresentation.

Commentators have tended to assert or assume that the ABA was responsible for drafting S. 2061 and have taxed the organization for drafting or supporting a bill replete with interpretive difficulties. See, e.g., Clark, *Supreme Court Power*, *supra* note 41, at 1304; Clark, *Procedural Reform*, *supra* note 41, at 146-47; Sunderland, *supra* note 36, at 1120. Compare Clark, *supra* note 218, at 22-23 & n.1, where the author recognizes that the 1924 version of the uniform federal procedure bill "was spoken of as Senator Albert B. Cummins' bill," but asks: "Is there not a touch of irony in the fact that the leaders of the American Bar should for years have supported a bill so defective from the standpoint of technical workmanship. I fear it means that, while their hearts were enlisted in the cause of reform, their heads and hands were not." See also C. CLARK, *supra* note 41, at 41 (footnote omitted) ("Of course, the reason is largely to be found in the fact . . . that the two sections were drafted about ten years apart and for different objectives.").

In fact, even more than in 1914, see *supra* note 158, the ABA found it necessary to tailor its campaign to political considerations, and Chief Justice Taft was in part responsible for any defects in "technical workmanship." Note, moreover, that both sections were drafted in 1923.

Section 2 of S. 2061, *supra*, required that the rules lie before Congress for an entire session. The latter requirement was part of the bill that was enacted in 1934, and commentators have attributed it to special congressional interest in the "drastic" reform that merger represented. Mitchell, *Reform in Judicial Procedure*, 24 A.B.A. J. 197, 199 (1938); see C. CLARK, *supra* note 41, at 43 ("important and historically revolutionary"). As discussed *infra* text accompanying note 280, the controversy surrounding § 2 of the bill evident in the reports and proceedings of the ABA is not reflected in the legislative documents. Moreover, as we now know, Taft himself was responsible for the provision, departing from the six-month period recommended in his 1922 ABA speech, see *supra* text accompanying note 246, for political reasons. See *supra* note 267. It did not make Shelton happy. See *supra* note 266. Taft had borrowed the idea of submission from the English practice, which he had described but which permitted rules to be effective unless and until annulled by Parliament. See Taft, *supra* note 244, at 261; see also S. ROSENBAUM, *THE RULE-MAKING AUTHORITY IN THE ENGLISH SUPREME COURT* 25-26 (1917); Sunderland, *supra* note 36, at 1116-17. Within a year Taft had revised his proposal in this respect, see 7 J. AM. JUDICATURE Soc'y 134, 135 (1923), and President Coolidge's recommendation in his 1923 message to Congress also accorded with the English model, see 65 CONG. REC. 96, 98 (1923). Taft probably wrote that part of the message. See W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 132, 141 (1964). Moreover, after Taft drafted § 2, Shelton attempted to recover some of the ground that the latter had ceded to Congress. See *supra* note 267.

Taft's 1922 ABA proposal and Shelton's proposal to Cummins applied both to the original rules and to amendments. See *supra* text accompanying note 246; note 256. One of the reasons Dean Clark argued so strenuously against an inter-

## 4. The Cummins Bill, 1924-1926

As chairman of a subcommittee of the Senate Judiciary Committee, Cummins presided over a hearing on S. 2061 on February 2, 1924.<sup>269</sup> The subcommittee heard testimony in support of the bill from Shelton, and from Justices Van Devanter, McReynolds, and Sutherland.<sup>270</sup> When asked their view as to the "proper con-

pretation of the 1934 Act that would subject amendments to the process prescribed in § 2 was his belief that submission prior to effectiveness would undermine the historic goal of speedy amendment. See, e.g., C. CLARK, *supra* note 41, at 43-45; Clark, *Supreme Court Power*, *supra* note 41, at 1309-10. Clark's arguments, which took no account of Taft's proposal, did not prevail. See 308 U.S. 642-43 (1939); *infra* note 601. In 1950, however, the Act as codified was amended to permit reporting to Congress "at or after the beginning of a regular session thereof but not later than the first day of May" and effectiveness upon "the expiration of ninety days after they have been thus reported." Act of May 10, 1950, ch. 174, § 2, 64 Stat. 158. See *infra* note 404. The legislative history of these amendments, which were proposed by the Judicial Conference, indicates that they reflected that body's belief "both that the present procedure for adoption of the rules is unnecessarily long and drawnout and that it comes at an unfortunate time." S. REP. NO. 1491, 81st Cong., 2d Sess. 2 (1950).

<sup>269</sup> See *Procedure in Federal Courts, Hearing on S. 2060 and S. 2061 Before a Subcomm. of the House Judiciary Comm.*, 68th Cong., 1st Sess. (1924) [hereinafter cited as the 1924 *Senate Hearing*]. Most of the hearing was devoted to S. 2060, the main purpose of which was to redefine the jurisdiction of the courts of appeals and of the Supreme Court. See Act of February 13, 1925, ch. 229, 43 Stat. 936. For a description of Taft's role in securing this legislation, the preparation of which by members of the Court was openly acknowledged, see W. MURPHY, *supra* note 268, at 137-45.

<sup>270</sup> Cummins "expressed deep concern as to the personnel to appear before the Sub-Committee." Letter from Thomas W. Shelton to the Hon. William H. Taft (January, 1924), *supra* note 267. However, although Cummins originally was of the view that members of the Court should not appear, Shelton pressed on him and on Taft the notion that the latter should testify. See letter from Thomas W. Shelton to the Hon. William H. Taft (January 28, 1924) (Taft Papers, *supra* note 255, reel 260); letter from Thomas W. Shelton to the Hon. Albert B. Cummins (January 29, 1924) (Taft Papers, *supra* note 255, reel 260). Taft agreed with Cummins' original view, stating that he was "not anxious to go before the Judiciary Committee," and that "no one else is in our Court." Letter from the Hon. William H. Taft to Thomas W. Shelton (January 17, 1924) (Taft Papers, *supra* note 255, reel 260). After Shelton had disregarded his wishes, Taft wrote to Cummins:

I beg you to believe that Tom in writing you did not speak for me. I am strongly of the view, knowing what I do about your committee and the Senate, that it is a great deal wiser for you to depend on evidence of Judges McReynolds, Van Devanter and Sutherland than it is to have me appear in the attitude of urging bills. I think my view is generally known at any rate, and that it might injure the bill with those—of whom there are a number—who object to any activity on my part in matters of legislation . . . .

Letter from the Hon. William H. Taft to the Hon. Albert B. Cummins (January 31, 1924) (Taft Papers, *supra* note 255, reel 261). Taft had already written to Cummins asking him to send a copy of S. 2061 to the named Justices, as well as to the Justices themselves. See letter from the Hon. William H. Taft to the Hon. Albert B. Cummins (January 29, 1924) (Taft Papers, *supra* note 255, reel 260); letters from the Hon. William H. Taft to Justices McReynolds, Van Devanter and Sutherland (January 29, 1924) (Taft Papers, *supra* note 255, reel 260). His attitude on this matter may explain Shelton's subsequent dissembling. See *supra* note 268. But see *supra* note 269. See also W. MURPHY, *supra* note 268, at 142-43.

struction of the words 'practice and procedure' " <sup>271</sup> by Cummins, Sutherland and McReynolds replied:

Mr. Justice Sutherland. Well, I don't know that I can give any precise definition. They apply, of course, wholly to the adjective law. They could not involve the making of any substantive law, because the Congress would be powerless to delegate such power to the courts. I should say it would be confined to making rules pointing out the way in which cases should be presented, and the way in which the court should discharge its duty in determining what the substantive law is. I don't know that I could state it any more accurately than that.

Mr. Justice McReynolds. A method of determining and enforcing rights and liabilities which have been prescribed by law.

Mr. Justice Sutherland. Yes: it would enable the courts to determine the "how" but not the "what" of the law.

Senator Cummins. I consider that a very comprehensive answer. To determine the method by which he gets in and the case is presented to the court that is to decide the law of the case.<sup>272</sup>

Pursuing further the limits of the grant of rulemaking authority, Cummins noted an objection raised by others—although he made clear that he did not share the view—that the bill might authorize the Supreme Court to make rules for the execution of its writs, including, in particular, to prescribe the property upon which a writ could be levied, in contravention of state statutes.<sup>273</sup> Sutherland replied that he did not see how a provision relating to "forms of writs and process . . . could be extended to include power to say upon what property it might be levied, or regulate it in that respect." <sup>274</sup> Sutherland was more tentative in response to a question about the extent of the Court's authority under the bill to

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Cummins was particularly interested in Sutherland's views, because the latter had considered the subject of rulemaking as a member of the Senate and had authored the 1917 Senate Report, which Cummins termed "very illuminating" and "very complete" and had printed as part of the record. 1924 *Senate Hearing*, *supra* note 269, at 56; *see also id.* 47. In addition, Cummins had consulted Sutherland prior to introducing S. 2061 and had sought his views about a draft of the bill. *See supra* note 260.

<sup>271</sup> 1924 *Senate Hearing*, *supra* note 269, at 56.

<sup>272</sup> *Id.*

<sup>273</sup> *See id.* 61; *see also id.* 68.

<sup>274</sup> *Id.* 62.

provide notice to nonresident defendants.<sup>275</sup> Justice Van Devanter invoked the analogy of the Court's Equity Rules, which did not treat the matter, leaving it to statutory regulation.<sup>276</sup>

It appears from Justice Sutherland's testimony at the 1924 Senate Hearing that he, like Shelton, may have treated the various incarnations of the uniform federal procedure bill as fungible.<sup>277</sup> The objections to the Cummins bill cited by Cummins, however, are evidence that others remarked the potential breadth of the grant of authority in section 1. Indeed, Cummins' 1923 letters to members of the Court suggest that he anticipated such objections and attempted to meet them in the second sentence of his bill.<sup>278</sup> In any event, the function of the second sentence was immediately grasped. In an article advocating the enactment of the

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<sup>275</sup> See *id.* He did suggest, however, that the Court would not be authorized to provide for notice in some other way than required by the state laws Cummins used as examples. *Id.*

<sup>276</sup> I understand that the way in which in equity we bring in parties who live in other jurisdictions is according to modes prescribed by statute and not dealt with in the rules, and that the court has always dealt with that as a question to be regulated by Congress or by statutes and not as a matter to be regulated by rules.

*Id.*

Very little attention was devoted to § 2 of the Cummins Bill at the 1924 Senate Hearing. See *id.* 61-62; 69-70. Indeed, Shelton almost overlooked it in his statement. See *id.* 69.

<sup>277</sup> Justice Sutherland's response to Cummins' question regarding executions, see *supra* text accompanying notes 273-74, seems to have been based on the language of the Sutherland bill, not the Cummins bill. The former's first grant related to "the forms of writs and all other process." See *supra* note 228. The latter's first sentence referred to "the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law." See *supra* note 268. The failure to distinguish between the two was not uncommon. See, e.g., Paul, *The Rule-Making Power of the Courts*, 1 WASH. L. REV. 163, 163 n.1 (1926) (describing as "modeled after the proposed Federal rulemaking act" a Washington statute that clearly followed the Sutherland bill); Note, *The Federal Uniform Procedure Bill*, 23 MICH. L. REV. 154 (1924) (discussing S. 2061 but quoting the Sutherland bill).

Further evidence that Justice Sutherland failed to note changes in the bill is found in his discussion of the advantage that a court rules system has over legislative regulation in terms of the speed of amendment. The Justice observed:

Under a system of this kind whenever a defect appears in the rule the court can take it up, have a conference, and determine upon it, and a new rule or amended rule put in operation in a week or two weeks instead of going through a long process in the legislature to have it done.

1924 Senate Hearing, *supra* note 269, at 55.

Justice Sutherland may have intended to imply the view that amendments under the Cummins bill were not subject to either the waiting period of § 1 or the reporting requirement of § 2. More probably he had not noticed or had forgotten such requirements. For further discussion of the goal of speedy amendment, see W. WILLOUGHBY, *PRINCIPLES OF JUDICIAL ADMINISTRATION* 422-23 (1929).

<sup>278</sup> See *supra* note 260.

Cummins bill and predicting that it would "mark the most important single step ever taken in the improvement of judicial procedure in the United States," Professor Scott observed:

The legislature cannot, to be sure, constitutionally give power to the courts to make laws covering substantive rights. The making of such laws is a legislative and not a judicial function. The courts may not make substantive law except in so far as the decision of an actual controversy serves as a precedent for the determination of subsequent controversies, if, indeed, this process can be called making and not merely pronouncing or discovering law. In the Senate bill, it is expressly provided that the rules of the Supreme Court shall not affect the substantive rights of any litigant.<sup>279</sup>

The reception accorded section 2 of the Cummins bill at the 1924 Senate Hearing, where it attracted little comment and augured no controversy, was typical of its formal legislative treatment throughout the decade.<sup>280</sup> The impression gained from such treatment, however, may be misleading, for, according to the 1924 report of Shelton's ABA committee, section 2 "was not pressed when objection was raised to it in the subcommittee,"<sup>281</sup> and only section 1 was reported to the full Senate Judiciary Committee.<sup>282</sup> Thereafter, if one read only the ABA Reports, it might appear that section 2 was the object of a vigorous debate whether merger of law and equity procedure could constitutionally be effected, as opposed to implemented, by court rule.<sup>283</sup> But even the ABA's

<sup>279</sup> Scott, *Actions at Law in the Federal Courts*, 38 HARV. L. REV. 1, 3-4 (1924). The version of the Cummins bill quoted by Scott contained § 1 only. See *id.* 2-3; *infra* text accompanying note 282.

Prior to the appearance of Scott's article, Shelton had written to Senator Cummins: "You have no doubt observed the support given by your State papers. The Press has been unusually helpful all over the country. Led by Harvard Law Review, all the Law Magazines will be out in November in support . . ." Letter from Thomas W. Shelton to the Hon. Albert B. Cummins (October 24, 1924) (Taft Papers, *supra* note 255, reel 268).

<sup>280</sup> See *supra* note 276; *infra* notes 317 & 350.

<sup>281</sup> *Report of the Committee on Uniform Judicial Procedure*, 49 A.B.A. REP. 483, 485 (1924).

<sup>282</sup> *Id.* Shelton wrote the report on May 1. *Id.* 483. On May 26, S. 2061 was reported by the Judiciary Committee without amendment. See 65 CONG. REC. 9485 (1924). This probably explains why one ABA member repeated the objections that had been made to § 2. See 49 A.B.A. REP. 98-100 (1924) (statement of Mr. Gresham).

<sup>283</sup> See, e.g., 50 A.B.A. REP. 121-22 (1925) (remarks of Messrs. Gresham and Shelton); 52 A.B.A. REP. 122-24 (1927) (remarks of Messrs. Gresham and Shelton); *Report of the Committee on Uniform Judicial Procedure*, 54 A.B.A. REP. 514, 515 (1929); see also Clark, *Procedural Reform and the Supreme Court*,

accounts are inconsistent,<sup>284</sup> and the bare legislative record does not support the notion that section 2 was controversial.<sup>285</sup>

From its introduction in 1924, the Cummins bill was the prize in a tug of war between its supporters, including in particular Shelton and Taft, and its most vocal opponent, Senator Walsh. The bill's supporters wanted to bring it to a vote on the floor of the Senate.<sup>286</sup> Walsh's goal, or so he represented, was to insure that his colleagues on the Judiciary Committee heard the arguments against the bill before it was reported out.<sup>287</sup> The propaganda for the bill did not abate, and it became even more personal, possibly stiffening Walsh's resistance.<sup>288</sup> Although the

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8 AM. MERCURY 445, 446 (1926) ("Nevertheless, the Bar Association committee has relinquished its original plan to fight for the single procedure.").

<sup>284</sup> See, e.g., *Report of the Special Committee on Uniform Judicial Procedure*, 53 A.B.A. REP. 500, 502 (1928) ("this section has so far met with no objection and should be retained").

<sup>285</sup> See *supra* text accompanying note 280. All of the Senate bills introduced from 1924 through 1930 and sponsored by the ABA contained § 2. See S. 2061, *supra* note 268; S. 477, 69th Cong., 1st Sess. (1925); S. 759, 70th Cong., 1st Sess. (1927); S. 4573, 71st Cong., 2d Sess. (1930). In the House, there was one exception, H.R. 11,071, 68th Cong., 2d Sess. (1924), which contained only § 1. The rest included § 2. See H.R. 419, 69th Cong., 1st Sess. (1925); H.R. 5621, 70th Cong., 1st Sess. (1927).

<sup>286</sup> See, e.g., 49 A.B.A. REP. 483, 486 (1924); 50 A.B.A. REP. 539, 544 (1925); 53 A.B.A. REP. 500, 503-04 (1928). Taft continued to be active, albeit behind the scenes, in promoting the legislation beyond the introduction of S. 2061. In late 1924 he reported to Cummins that he had had correspondence with Senator Swanson about "the Supreme Court procedure bill," a copy of which he sent to Cummins since it might be of assistance to him. Letter from the Hon. William H. Taft to the Hon. Albert B. Cummins (December 19, 1924) (Cummins Papers, *supra* note 260); see also *infra* notes 290, 291 & 295-97; A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 114-20 (1964). For Taft's lobbying activities more generally, see P. FISH, *supra* note 41, at 79-90; A. MASON, *supra*, 88-137; W. MURPHY, *supra* note 268, at 132-45, 163-68.

The Senate was the focus of the ABA's campaign during this period. Shelton believed passage in the House would follow favorable action in the Senate. See, e.g., *Report of the Special Committee on Uniform Judicial Procedure*, 49 A.B.A. REP. 483, 488 (1924); see also 53 A.B.A. REP. 500, 506 (1928). Nevertheless, many of his Committee's annual reports from 1925 complained of inability to get the bill out of the House Judiciary Committee as well. See, e.g., *Report of the Special Committee on Uniform Judicial Procedure*, 50 A.B.A. REP. 539, 544 (1925).

<sup>287</sup> See Shelton, *Present Situation as to Uniform Procedure Bill*, 12 A.B.A. J. 498 (1926); Walsh, *supra* note 220; letter from the Hon. Albert B. Cummins to Thomas W. Shelton (April 4, 1926) (Cummins Papers, *supra* note 260). Over the years, Walsh was consistent in denying the ABA's charges that he was arbitrarily obstructing Senate consideration of the uniform federal procedure bill and in insisting that his arguments against the bill had either not been heard publicly or by the Judiciary Committee or, if heard, answered. See, e.g., letter from the Hon. Thomas J. Walsh to the Hon. J.W. Hamilton (December 6, 1920) (Walsh Papers, *supra* note 154, Container 281); letter from the Hon. Thomas J. Walsh to the Hon. Thomas Z. Lee (February 19, 1925) (Walsh Papers, *supra* note 154, Container 281); letter from the Hon. Thomas J. Walsh to Mr. J.H. Tregoe (June 25, 1926) (Walsh Papers, *supra* note 154, Container 302).

<sup>288</sup> See *supra* note 217; Walsh, *supra* note 220.



Judiciary Committee reported the bill without amendment in 1924,<sup>289</sup> Walsh succeeded in having it recommitted with Cummins' consent.<sup>290</sup> In 1925, Shelton told ABA members that Walsh had agreed to report the bill, even if adversely, in December.<sup>291</sup> Apparently he misunderstood; the bill was not reported.<sup>292</sup> In March, 1926, Cummins wrote Shelton that, after listening to Walsh argue "the greater part of the forenoon" against the bill, no Republican wanted to vote.<sup>293</sup> He was at his "wits' end," not at all sure how the Republicans would vote, and "much inclined to just let the matter drop."<sup>294</sup> However, he did not do so. A vote

<sup>289</sup> See 65 CONG. REC. 9485 (1924).

<sup>290</sup> See 66 CONG. REC. 503 (1924). Walsh objected that the bill had been considered when he was not present, a fixed date having been set for that purpose, which meeting had been cancelled because of a majority caucus. See letter from the Hon. Thomas J. Walsh to the Hon. Albert B. Cummins (December 3, 1924) (Taft Papers, *supra* note 255, reel 269). Shelton advised Cummins to assent to recommitment, albeit on the erroneous premise, which Walsh corrected in his letter to Cummins, that Walsh would facilitate the passage of the bill if the Judiciary Committee again reported it favorably. See letter from Thomas W. Shelton to the Hon. Albert B. Cummins (November 28, 1924) (Taft Papers, *supra* note 255, reel 269). Cummins was doubtful about the wisdom of this course, although, having counted votes, he thought "it . . . pretty safe to predict that the bill would again be reported after any argument that Senator Walsh might make against it." Letter from the Hon. Albert B. Cummins to Thomas W. Shelton (December 2, 1924) (Taft Papers, *supra* note 255, reel 269). Shelton sought Taft's approval of recommitment. See letter from Thomas W. Shelton to the Hon. William H. Taft (December 4, 1924) (Taft Papers, *supra* note 255, reel 269); see also letter from Thomas W. Shelton to the Hon. Albert B. Cummins (December 4, 1924) (Taft Papers, *supra* note 255, reel 269); letter from Thomas W. Shelton to the Hon. Thomas J. Walsh (December 4, 1924) (Taft Papers, *supra* note 255, reel 269).

<sup>291</sup> See 50 A.B.A. REP. 122 (1925) (remarks of Mr. Shelton). It was quickly clear that the gamble of recommitment was a mistake. On January 5, the Senate Judiciary Committee voted 8-6 against the bill. See Vote on Procedural Bill in Committee (undated) (Walsh Papers, *supra* note 154, Container 303); see also letter from the Hon. Thomas J. Walsh to the Hon. Thomas Z. Lee, *supra* note 287; S. REP. NO. 1174, 69th Cong., 1st Sess. 21 (1926) (Minority Views). Shelton wrote Taft that "Senator Borah and Norris have deserted the Senator or he misunderstood them," that he had recommended that Cummins "bring out a minority report," and that he feared "Borah's desertion has made a pessimist of him instead of a fighter." Letter from Thomas W. Shelton to the Hon. William H. Taft (January 6, 1925) (Taft Papers, *supra* note 255, reel 270); see also letter from Thomas W. Shelton to the Hon. Albert B. Cummins (January 6, 1925) (Taft Papers, *supra* note 255, reel 270). Borah voted against the bill. Norris was absent and did not vote. Vote on Procedural Bill in Committee, *supra*.

<sup>292</sup> 51 A.B.A. REP. 119-20 (1926) (remarks of Mr. Shelton). But see *supra* note 291.

<sup>293</sup> Letter from the Hon. Albert B. Cummins to Thomas W. Shelton (March 8, 1926) (Cummins Papers, *supra* note 260; Taft Papers, *supra* note 255, reel 280).

<sup>294</sup> *Id.* Upon receipt of Cummins' letter, Shelton replied urging that he get in touch with Taft and suggesting that the latter would testify. See letter from Thomas W. Shelton to the Hon. Albert B. Cummins (March, 1926) (Taft Papers, *supra* note 255, reel 281). Thereafter, he wrote asking for the Senator's understanding of any "signs of keen disappointment" about what "ha[d] been and

was taken, and the bill was favorably reported by the Judiciary Committee in May.<sup>295</sup> In July, Cummins submitted the Committee's report, and Walsh filed the views of the minority.<sup>296</sup>

#### 5. The 1926 Senate Report: The Cummins Bill's Limitations on Rulemaking Are Defined

In the 1926 Report, the Senate Judiciary Committee undertook "to review with some care the entire subject" covered by the

[would] continue to be the life work of the writer," and expressing the hope "that the Congress, if in its good judgment it rejects the American Bar Association's plan, will offer a substitute." Letter from Thomas W. Shelton to the Hon. Albert B. Cummins (March 19, 1926) (Taft Papers, *supra* note 255, reel 281). Cummins responded immediately, indicating his conviction that a vote would be taken within two weeks. See letter from the Hon. Albert B. Cummins to Thomas W. Shelton (March 20, 1926) (Taft Papers, *supra* note 255, reel 281). Shelton reported the "resurgence" to Taft. Letter from Thomas W. Shelton to the Hon. William H. Taft (March 23, 1926) (Taft Papers, *supra* note 255, reel 281).

<sup>295</sup> See 67 CONG. REC. 9586 (1926). The vote was taken on May 13, 1926. Eight senators voted in favor and six against. Two senators (Norris and Gillette) were present but declined to vote. See Vote on Procedural Bill in Committee, *supra* note 291.

<sup>296</sup> See 67 CONG. REC. 12,472 (1926). On the day the bill was reported, Walsh wrote to Taft and apparently to all the other members of the Supreme Court, repeating some of his arguments against it, enclosing a copy of his April 23 speech to the Tri-State Bar Association at Texarkana (which subsequently became the Minority Views to the 1926 Senate Report), and seeking to discover whether the representation that all members of the Court supported the bill was true. See letter from the Hon. Thomas J. Walsh to the Hon. William H. Taft (May 14, 1926) (Taft Papers, *supra* note 255, reel 282). Justice Stone sent Taft a copy of an identical letter from Walsh and of his response, which supported the bill, noting: "Our clever friend never misses an opportunity to drive a thin wedge into the line of the enemy if he thinks he sees a possibility of doing so." Letter from the Hon. Harlan F. Stone to the Hon. William H. Taft (May 17, 1926) (Taft Papers, *supra* note 255, reel 282). Stone's reply to Walsh is also in the Walsh Papers, *supra* note 154, Container 302. For the probable reasons for Stone's attitude toward Walsh, who opposed his nomination in 1925 because of the indictment of Senator Wheeler, see A. MASON, *supra* note 58, at 188-200. Justice Sutherland also supported the bill. See letter from the Hon. George Sutherland to the Hon. Thomas J. Walsh (May 19, 1926) (Walsh Papers, *supra* note 154, Container 301). Justices Van Devanter and McReynolds were non-committal. See letter from the Hon. Willis Van Devanter to the Hon. Thomas J. Walsh (June 22, 1926) (Walsh Papers, *supra* note 154, Container 301); letter from the Hon. James C. McReynolds to the Hon. Thomas J. Walsh (June 9, 1926) (Walsh Papers, *supra* note 154, Container 301). Justice Butler had no opinion. See letter from the Hon. Pierce Butler to the Hon. Thomas J. Walsh (May 27, 1926) (Walsh Papers, *supra* note 154, Container 301). Justice Brandeis declared himself "unreservedly against the measure," noting that he had "thought otherwise before his experience on the Court." Letter from the Hon. Louis D. Brandeis to the Hon. Thomas J. Walsh (May 14, 1926) (Walsh Papers, *supra* note 154, Container 301). Brandeis was a member of the first ABA Committee on Uniform Judicial Procedure. See *supra* note 153. Justice Holmes could "see the objections much more clearly than [he could] see the . . . advantages." Letter from the Hon. Oliver Wendell Holmes to the Hon. Thomas J. Walsh (May 22, 1926) (Walsh Papers, *supra* note 154, Container 301). Chief Justice Taft had endeavored to prevent Brandeis and Holmes from sending their letters. See letter from the Hon. William H. Taft to Thomas W. Shelton (May 23, 1926) (Taft Papers, *supra* note 255, reel 282).

Cummins bill.<sup>297</sup> After stating the general purposes of section

Walsh also wrote to others, including many, if not all, federal judges. Summarizing the replies, Walsh said that the "very decided majority of those who responded are against the plan." Letter from the Hon. Thomas J. Walsh to the Hon. John C. Shea (October 1, 1929) (Walsh Papers, *supra* note 154, Container 302); *see also* letter from the Hon. Thomas J. Walsh to the Hon. H. M. Neely (November 22, 1926) (Walsh Papers, *supra* note 154, Container 302).

Taft supported the suggestion that Cummins' report be sent to all ABA members, and added all judges to the list. *See* letter from the Hon. William H. Taft to Thomas W. Shelton (June 6, 1926) (Taft Papers, *supra* note 255, reel 282).

<sup>297</sup> S. REP. NO. 1174, 69th Cong., 1st Sess. 1 (1926) [hereinafter cited as 1926 SENATE REPORT]. It comes as no surprise that Cummins had help in writing the 1926 Senate Report. The extent of the assistance and of his reliance on materials provided is unclear. It is clear, however, that Chief Justice Taft provided material on § 2 (which he had written). On May 31, 1926, he sent to Cummins a six-page memorandum on § 2 for possible use by the latter. *See* letter from the Hon. William H. Taft to the Hon. Albert B. Cummins (May 31, 1926) (Taft Papers, *supra* note 255, reel 282) (with enclosure). It is also clear that the material was not used. The 1926 Senate Report devoted only one short paragraph to § 2. *See* 1926 SENATE REPORT, *supra*, at 19; *infra* note 317. Shelton also provided material on § 2 that was not used. *See* letter from Thomas W. Shelton to the Hon. Albert B. Cummins (May 25, 1926) (Taft Papers, *supra* note 255, reel 282).

It is considerably more difficult to determine the extent to which Cummins relied on others in connection with § 1. The most likely sources of help were Shelton and the Chief Justice's brother, Henry W. Taft. In May 1926, Henry Taft wrote the Chief Justice, returning a copy of Walsh's Texarkana speech and commenting upon it. He suggested that the first sentence of the Cummins bill "was intended to be confined to matters of mere procedure, and not to those matters which affect substantial rights," and that matters raised by Walsh such as orders of arrest, attachments, and statutes of limitations, were not within the grant of the first sentence:

On the contrary they affect substantial rights and remedies, and are matters for legislative cognizance. I should be inclined to agree with Senator Walsh that if such matters as provisional remedies, evidence, limitation of actions, the amount of court costs, and other matters which relate to substantive rights, were to be committed to the Supreme Court, the task would be too onerous, and, furthermore, would vest the Court with power to make rules concerning matters which are properly for the legislature.

Henry Taft concluded that, although he thought he "could make a pretty satisfactory answer to the most striking parts of Walsh's argument . . . it would take more time than [he had] at [his] command at the moment," and that therefore it was Shelton's job. Letter from Henry W. Taft to the Hon. William H. Taft (May 17, 1926) (Taft Papers, *supra* note 255, reel 282). Shelton did prepare a report which the Chief Justice sent to his brother with a request for such additions as occurred to him. *See* letter from the Hon. William H. Taft to Henry W. Taft (May 21, 1926) (Taft Papers, *supra* note 255, reel 282). Cummins thought that it required changes. *See* letter from the Hon. William H. Taft to Thomas W. Shelton (May 23, 1926) (Taft Papers, *supra* note 255, reel 282). Six days later Henry Taft sent to Cummins, with a copy to his brother, a memorandum to assist the Senator in drafting the Report. In his letters to both, Henry Taft expressed dissatisfaction with his answer to the matters raised by Walsh. In his letter to Cummins he stated:

I found it difficult in the brief time at my disposal to get anything which was conclusive upon the subject. I am inclined to think that the reason is that his assumption that a court in making rules of procedure would have the power to deal with such matters is so wanting in fundamental principle that decisions are hard to find.

1,<sup>298</sup> the Committee described in detail the failure of the Conformity Act to achieve its purpose and the unsatisfactory condition of federal practice that obtained as a result,<sup>299</sup> rebutted the objections that the bill would cause greater inconvenience to the bar than did the Conformity Act and that the Supreme Court was too busy to draft rules,<sup>300</sup> and noted some of the theoretical and practical advantages of regulating procedure by court rules.<sup>301</sup> The Senate Committee deemed the suggestion that the bill involved an unconstitutional delegation of legislative power to the Supreme Court one that could "hardly be urged seriously"<sup>302</sup> in light of the history of such delegations and the opinions of the Supreme Court discussing them.

The Committee, however, took very seriously the claim by Senator Walsh that the delegation in the Cummins bill extended to matters such as "limitations of actions, provisional remedies, such as orders of arrest and attachment, and the selection or quali-

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Letter from Henry W. Taft to the Hon. Albert B. Cummins (May 27, 1926) (Taft Papers, *supra* note 255, reel 282); *see also* letter from Henry W. Taft to the Hon. William H. Taft (May 27, 1926) (Taft Papers, *supra* note 255, reel 282).

Unfortunately, neither Shelton's draft nor Henry Taft's memorandum could be located in either the Cummins or Taft Papers, and inquiries to Taft's law firm and a grandson suggest that Taft's memorandum has not survived elsewhere. Thus, while there are grounds for inference that Cummins relied on his memorandum, *see, e.g., infra* text accompanying notes 309 & 315; *infra* note 326, it is impossible at this time to be precise about the extent of that reliance. It is tempting, for instance, to attribute to Henry Taft the 1926 Senate Report's reliance on the 1915 New York Report. *See infra* text accompanying notes 313-16. But the New York model had been resorted to as early as 1914 by both the Committee on Uniform Judicial Procedure and the House Judiciary Committee. *See supra* text accompanying notes 183-84.

<sup>298</sup> First, to make uniform throughout the United States the forms of process, writs, pleadings, and motions and the practice and procedure in the district courts in actions at law. It is believed that if this were its only advantage that [*sic*] lawyers and litigants would find, in uniformity alone, a tremendous advance over the present system.

Second, these general rules, if wisely made, would be a long step toward simplicity, a most desirable step in view of the chaotic and complicated condition which now exists.

Third, it would tend toward the speedier and more intelligent disposition of the issues presented in law actions and toward a reduction in the expense of litigation.

Fourth, it would make it more certain that if a plaintiff has a cause of action he would not be turned out of court upon a technicality and without a trial upon the very merits of the case; and, likewise, if the defendant had a just defense he would not be denied by any artifice of [*sic*] the opportunity to present it.

1926 SENATE REPORT, *supra* note 297, at 1-2.

<sup>299</sup> *Id.* 2-5.

<sup>300</sup> *Id.* 5-7.

<sup>301</sup> *Id.* 7-8.

<sup>302</sup> *Id.* 8.

fication of jurors.”<sup>303</sup> In the longest section of the 1926 Senate Report, entitled “The Bill Does Not Attempt to Affect Substantive Rights or Remedies,”<sup>304</sup> the Committee explained why the bill authorized neither court rules relating to those matters nor, as also argued by opponents, court rules relating to “substantial rights and remedies in a manner contrary to the public policy of the several States embodied in local statutory law.”<sup>305</sup>

Starting with the language of the Cummins bill,<sup>306</sup> the Senate Committee reasoned that the first part of the first sentence related to “matters of form and [did] not affect substantial rights or remedies.”<sup>307</sup> The Committee recognized that the grant to make rules governing “the practice and procedure in actions at law” was broader but asserted that it did “not extend the power so as to affect substantive rights or remedies”; any other interpretation, the Committee said, would ignore the bill’s second sentence.<sup>308</sup> The matters raised by Senator Walsh involved “substantive legal and remedial rights affected by the considerations of public policy.”<sup>309</sup> Accordingly, the Committee concluded that, although those matters affected remedies, they were not “mere procedure, such as a court has power to prescribe,” but were rather “solely within the legislative power.”<sup>310</sup> In support of its conclusion, the Committee marshalled the experience in England and in the states:

[The matters raised by Senator Walsh] involve the policy of the law which varies in the different States and are and always have been regulated by legislative act. Neither in England nor in any State of the United States where the courts are vested with the rule-making power, has it been assumed that the delegation of that power to them authorizes them to deal with such substantial rights and remedies as those just referred to. In Delaware, Virginia, New Jersey, and Colorado, where the courts have for years had power to make rules of practice and procedure, they have never assumed to make rules relating to limitations of actions, attachment or arrest, juries or jurors or evi-

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<sup>303</sup> *Id.* 9; *see id.* 26-28 (Minority Views).

<sup>304</sup> *Id.* 9-16.

<sup>305</sup> *Id.* 9.

<sup>306</sup> The language is set forth *supra* note 268.

<sup>307</sup> 1926 SENATE REPORT, *supra* note 297, at 9.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

dence; and in each of those States such matters are reserved for statutory regulation.<sup>311</sup>

In his Minority Views, Walsh claimed that the Supreme Court's rulemaking work would necessarily, and could under the Cummins bill, include all matters typically found in a code of procedure.<sup>312</sup> The majority of the Senate Committee responded by referring to the reform movement in New York, in particular the work of the Board of Statutory Consolidation.<sup>313</sup> It noted that the New York Board had classified certain matters, including those raised by Walsh, as substantive law and quoted passages from the 1915 New York Report explaining the classifications.<sup>314</sup> After stating the reasons for its reference to the work of the New York Board,<sup>315</sup> the Committee continued to rely on it, albeit without further acknowledgement:

Any power in the Supreme Court to deal with such matters as those referred to must be rested solely upon the provision authorizing it to make rules relating to "practice and procedure in actions at law." In view of the express provision inhibiting the court from affecting "the substantive rights of any litigant," any court would be astute to avoid an interpretation which would attribute to the words "practice and procedure" an intention on the part of Congress to delegate a power to deal with such substantive rights or remedies. It would rather conclude that in using the words "practice and procedure" Congress only intended to confer the power to make such

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<sup>311</sup> *Id.* 9-10.

<sup>312</sup> *Id.* 26-27 (Minority Views).

It requires no elucidation before this assemblage that statutes of limitations appertain to the remedy and neither confer nor abridge any substantive right, that the period of the statute may be diminished or enlarged without violation of the Constitution of the United States, though it can not be reduced so as, in effect, to cut off all remedy.

*Id.* 27.

<sup>313</sup> *Id.* 10-11. The Committee also noted that the classifications made by the Committee on Code Revision of the New York State Bar Association included as substantive rights or remedies matters of the sort raised by Walsh. *Id.* 10. For the work of the New York Committee, see *supra* notes 157 & 174.

<sup>314</sup> See 1926 SENATE REPORT, *supra* note 297, at 10-11.

<sup>315</sup> We have made this somewhat extended reference . . . because of the eminent professional character of the members of the board and because it was probably the most scientific recent effort at simplification of a highly technical and complicated system of procedure having in view the segregation in a practice act and rules of court those matters which might properly be regarded as procedural.

*Id.* 11.

rules of practice and procedure as the court itself could make without enabling legislation, and they would not include matters of the kind referred to.

. . . .

Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which deprive a man of his liberty, as in the case of an order of arrest, or put an end to a good cause of action, as in the case of a limitation or abatement of an action, or determine what jurors shall try a case and how they shall be selected, are merely filling "up the details," even though they relate to remedial rights.<sup>316</sup>

In the concluding part of the section, the Senate Committee incorporated in the Report substantial portions of the standard report of the ABA's Committee on Uniform Judicial Procedure.<sup>317</sup>

Walsh's arguments in the Minority Views were designed to demonstrate not only the magnitude, but also the difficulty, of the task confronting the Supreme Court under the Cummins bill. He pointed out that matters such as limitations, arrest, attachment, and the composition of juries were controversial and were regulated in widely divergent ways among the states.<sup>318</sup> He asked which scheme of regulation the Supreme Court would choose to implement in its rules and asserted:

The task to be set the Supreme Court is not only appalling in its magnitude, but I venture to assert, in view of the radically different views of the bar, as exhibited in the statutes of the various states, the predilections arising

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<sup>316</sup> *Id.*

<sup>317</sup> See *id.* 12-16. Some of the borrowings are acknowledged; some are not. Compare *id.* 12 with *id.* 14-16. Chief among the latter is a passage, *id.* 12, adopting *verbatim* Shelton's two classes of procedure dichotomy, under which the legislature "prescribes what the courts may do, who shall be the parties participating, and fixes the rules of evidence and all important matters of procedure." See *supra* text accompanying note 237 (excerpt from standard report of the ABA Committee on Uniform Judicial Procedure).

The Report devoted only one paragraph to § 2, anticipating "no serious opposition to it." 1926 SENATE REPORT, *supra* note 297, at 19.

<sup>318</sup> See 1926 SENATE REPORT, *supra* note 297, at 26-28 (Minority Views).

from training and experience, it is a well-nigh impossible task.<sup>319</sup>

## 6. The Cummins Bill, 1926-1930: Changes in the Character of the Debate

Notwithstanding the favorable 1926 Senate Report, the Cummins bill did not reach a vote in the Senate.<sup>320</sup> Cummins died in 1926,<sup>321</sup> and the ABA's campaign began to show signs of exasperation.<sup>322</sup> About this time, however, serious discussion of the issues posed by court rulemaking increased in the literature. In part, the discussion was an outgrowth of the ABA's campaign, reflecting an attempt finally to put to rest the objections raised by Senator Walsh.<sup>323</sup> In addition, the discussion reflected interest in court rulemaking as a mode of procedural regulation in the states. Statutory authorizations were already in place in some states and had been acted on in a few.<sup>324</sup> Of course, the propaganda pieces were still published; indeed, the influence of events on argument was closer to the surface than ever.<sup>325</sup> At the same

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<sup>319</sup> *Id.* 28. In his May 14 letter to Taft, Walsh had asserted: "I insist that the task to be imposed upon the Supreme Court is well nigh impossible and involves labor on its part prodigious beyond the dreams of those who propose the legislation." Letter from the Hon. Thomas J. Walsh to the Hon. William H. Taft, *supra* note 296.

<sup>320</sup> On December 10, 1926, Walsh objected to S. 477's being called up on a call of the calendar, and it was passed over. See 68 CONG. REC. 223 (1926); Hepburn, *In the Hope of a New Birth of the One Form of Action*, 13 VA. L. REV. 69, 70 n.2 (1926).

<sup>321</sup> Cummins' death was "keenly felt" by the Committee on Uniform Judicial Procedure. 52 A.B.A. REP. 396, 397 (1927). For a discussion of Taft's views of Cummins' successor as Chairman of the Judiciary Committee, Senator Norris, see A. MASON, *supra* note 286, at 96.

<sup>322</sup> See, e.g., 52 A.B.A. REP. 119-22 (1927) (remarks of Mr. Shelton); Tuttle, *Reforms in Federal Procedure*, 14 A.B.A. J. 37, 38 (1928).

<sup>323</sup> In March, 1927, the *American Bar Association Journal* published as a supplement articles written by members of the Committee on the Rule Making Power of the Courts, formed in 1926. See 13 A.B.A. J. No. 3, pt. II (1927). In addition, see, e.g., H. TAFT, *LAW REFORM* 40-44, 98-108 (1926); Pound, *Senator Walsh on Rule-Making Power on the Law Side of Federal Practice*, 13 A.B.A. J. 84 (1927); Watkins, *Non-Conformity to State Practice in Law Cases in Federal Courts*, 14 A.B.A. J. 341 (1928).

<sup>324</sup> These developments were reported most prominently in the *Journal of the American Judicature Society*. See, e.g., *Rulemaking Principle Enacted in Delaware and Washington*, 9 J. AM. JUDICATURE SOC'Y 134 (1925); Whittier, *Regulating Procedure by Rules of Court*, 11 J. AM. JUDICATURE SOC'Y 15 (1927); *Judicial Reform Has Complete Program*, 12 J. AM. JUDICATURE SOC'Y 5 (1928); *Wisconsin Takes Long Step Forward*, 13 J. AM. JUDICATURE SOC'Y 71 (1929). See also Paul, *supra* note 277; *Judicial Versus Legislative Determination of Rules of Practice and Procedure—A Symposium*, 6 OR. L. REV. 36 (1926).

<sup>325</sup> See, e.g., Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally*, 23 ILL. L. REV. 276 (1928); *Campaign Strategy and the Rule-*



time, however, some of the subtleties and distinctions that once had been obscured by the rhetoric of reform began to emerge. One was the issue of making precise the matters allocated to the rulemakers and to the legislature, respectively. Another was the issue of treating the federal system and state systems as interchangeable for the purpose of evaluating rulemaking proposals.

a. *Questioning the Proper Allocation Between Court Rules and Legislation*

Not long after the Senate Judiciary Committee praised and relied on the work of the New York Board of Statutory Consolidation, Roscoe Pound took issue with one part of that work. Pound had previously stated his preference for a purer rules-of-court system than the New York Board's 1912 and 1915 Reports envisioned, on the ground that essential principles were no easier than details to prescribe *a priori*.<sup>326</sup> In 1927, he took the New York Board to task, in its criticism of the English system, for assuming "a theoretically exact, rigid, analytical separation of powers . . . not possible in so practical matter as government."<sup>327</sup> Pound expressed confidence that if, as he believed, court rulemaking was constitutional, "we need have no fear that it will disturb the balance of our government, nor that it will be at variance with democratic institutions."<sup>328</sup> Another scholar specifically questioned whether some of the matters classified as substantive law

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*Making Power*, 15 A.B.A. J. 24 (1929). For a collection of articles of a similar tenor published between 1929 and 1937, see Williams, *supra* note 19, at 505 n.159.

<sup>326</sup> See *supra* text accompanying notes 208-10. In a 1926 address to the Delaware State Bar Association, Henry Taft described the work of the New York Board, including its preference for a system combining practice act and rules of court, and observed:

There is no particular *a priori* objection to the enactment by the legislature of a few fundamental rules. But it is a curious phase of legislative psychology that *where the entire responsibility for formulating rules has been delegated to the courts, the tendency has been to allow such rules to stand without legislative interference*. When practice rules are made by the legislature there is an invitation to the legislature to multiply amendments.

Taft, *Uniformity of Procedure in the Federal Courts*, 12 A.B.A. J. 20, 21 (1926) (emphasis added). The 1926 Senate Report included language remarkably similar to that in italics. See 1926 SENATE REPORT, *supra* note 297, at 7.

<sup>327</sup> Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. No. 3, pt. II, at 12 (1927).

<sup>328</sup> *Id.* It is unclear whether Pound's criticisms were directed solely at the New York Board's espousal of a practice act as a means of prescribing the "fundamentals" of procedure in the first sense, described *supra* text accompanying notes 190-91, or whether they extended to its attempts to carve out, and characterize as substantive law, certain matters, including those characterized as "fundamental" in the second sense, described *supra* text accompanying notes 192 & 196-202.

by the New York Board ought not more properly to be regarded as procedure and therefore subject to rules of court.<sup>329</sup> On the other hand, there were those who perceived a problem in reposing exclusive control of procedural regulation in the courts, but they did so in terms of ensuring that the rulemakers stayed at work.<sup>330</sup>

b. *Questioning the Interchangeability of State and Federal Models*

The tendency to treat as interchangeable federal and state rulemaking proposals was understandable in light of the hope of the supporters of the uniform federal procedure bill that it would lead to similar legislation in the states and ultimately to uniform procedure throughout the country.<sup>331</sup> Moreover, both the ABA and congressional committees had consistently referred to state models, and in particular that proposed by the New York Board of Statutory Consolidation, to describe the scheme of allocation contemplated in the uniform federal procedure bill.<sup>332</sup> Finally, the uniform federal procedure bill in its various incarnations was used as the model for state legislation authorizing court rulemak-

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<sup>329</sup> See Paul, *supra* note 277, at 239-41. However, the decisions upon which the author based his question did not involve the allocation of lawmaking competence between the legislature and the courts. Cf. Montague, *Restoring to the Courts the Power to Make Rules of Procedure*, 6 OR. L. REV. 17, 19-20 (1926):

In response to another objection . . . the Courts would not rashly adventure upon ground which is debatable between adjective and substantive law. The Supreme Court of the United States has never shown any disposition to tamper with the Statutes of Limitations in its equity rules, nor with other fields which are technically procedural, but in which matters of general public policy indicate that Legislatures should have a voice. In my own view there would be no objection to reserving subjects in which the general policy of the law might be involved from the operation of the rulemaking power, at least until that system has approved itself in the exercise, and this would include attachment, and for the present, evidence, although I, personally, believe the law of evidence is responsible for a very large part of the preventable delay in trials without any corresponding gain in the achievement of justice.

The author appears to have been referring to the 1926 Senate Report.

<sup>330</sup> See, e.g., Clark, *supra* note 283, at 446, 449; Sunderland, *The Regulation of Legal Procedure*, 35 W. VA. L.Q. 301, 314-22 (1929). There were others, although apparently not many, who shared Senator Walsh's doubts about the constitutionality of the entire enterprise. See, e.g., Skipworth, *Change of Procedure*, 6 OR. L. REV. 24 (1926). Chief Justice Taft considered that a view "that nobody but an Irishman with a certain keenness of mind and without any sense of humor could solemnly advance." Letter from the Hon. William H. Taft to Henry W. Taft (May 21, 1926) (Taft Papers, *supra* note 255, reel 282). For agreement with Walsh's non-constitutional arguments, see Hall, *Uniform Law Procedure in Federal Courts*, 33 W. VA. L.Q. 131 (1927).

<sup>331</sup> See *supra* text accompanying notes 147-51; *supra* note 159.

<sup>332</sup> See *supra* text accompanying notes 183-84 & 313-16.

ing, and the claim was often made that the state rulemakers had not acted because they were waiting for federal court rules.<sup>333</sup>

Nonetheless, a uniform national procedure was not embraced by all who supported the idea of court rulemaking.<sup>334</sup> In addition, the propriety of treating the federal and state proposals as if they presented identical advantages and disadvantages was questioned. Some saw as the major difference the inapplicability at the state level of Senator Walsh's argument that uniform federal procedure would inconvenience lawyers by forcing them to learn two systems of procedure in order to practice in their home states.<sup>335</sup> Senator Walsh himself saw more:

Now I want it distinctly understood that I am making no argument whatever against the system of rules prescribed by a court as against laws enacted by the legislature. If the people of the state of Oregon believe that the Supreme Court of the state of Oregon can more wisely act upon such a matter than can their legislature, I shall have no fault to find. That is not what I inveigh against. What I do protest against is endeavoring to enforce uniformity in the federal courts of forty-eight states, presenting such radical differences in social, financial, and political organization as is evidenced by the different systems of law that exist in the various states with reference to matters of practice. It is confusing two entirely different questions.<sup>336</sup>

#### 7. The 1928 Senate Report: From Dissent to Majority Report

The beginning of the end of the ABA's campaign was signalled in 1928. The personnel of the Judiciary Committee had changed, and once again a majority was opposed to the uniform federal

<sup>333</sup> See *supra* note 277; *supra* text accompanying note 324; 9 J. AM. JUDICATURE Soc'y 4 (1925); 9 J. AM. JUDICATURE Soc'y 163 (1926). The earlier influence in the states of the ABA Committee of Fifteen's 1909 Report is noted in *Campaign Strategy and the Rule-Making Power*, *supra* note 325, at 24.

<sup>334</sup> See, e.g., Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 744 (1926) [hereinafter cited as Sunderland, *English Struggle*]; Sunderland, *A Reply to Senator Walsh*, 6 OR. L. REV. 73, 74 (1926).

<sup>335</sup> See, e.g., Hale, *The Rule-Making Power—Clarifying the Issue*, 6 OR. L. REV. 70, 70-71 (1926); Johnson, *Reform of Legal Procedure: Rule-Making Power for Courts*, 6 IND. L.J. 383, 395 (1931). Sunderland, *English Struggle*, *supra* note 334, at 744, opposed the idea of uniform procedure because it would, in his view, put an end to experimentation.

<sup>336</sup> Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 6 OR. L. REV. 1, 15 (1926), reprinted in 13 A.B.A. J. 87, 91-92 (1927). Walsh's objection, it should be noted, embraced a uniform federal procedure *in toto*.

procedure bill.<sup>337</sup> Pressure secured its release from committee,<sup>338</sup> but it was reported unfavorably.<sup>339</sup> The Committee's report contained a brief statement of the history of the bill.<sup>340</sup> It relied on Walsh's 1926 Texarkana speech, which had also been used as the Minority Views to the 1926 Senate Report,<sup>341</sup> for reasons "impelling the committee to the conclusion that the legislation is unwise, and perhaps unconstitutional."<sup>342</sup> The Minority Views to the 1928 Senate Report,<sup>343</sup> signed by Senator Deneen, supported passage. It was a considerably more elaborate document than the majority Report, valuable more as a source of information on the history of the campaign and of rulemaking in the states and England than as a source of further light on the proper interpretation of the Cummins bill. Again, however, care was taken to address Senator Walsh's spectre of "the vast extent and variety of rules that would be necessary, and of the complicated situations, the local differences, etc., that would have to be adjusted."<sup>344</sup> And again, reference was made to the New York experience. The minority noted that some of the matters dealt with in state codes were beyond the jurisdiction of federal courts and that other subjects, although within that jurisdiction, "were entirely outside the scope of rules of court."<sup>345</sup>

Matters of jurisdiction and of substantive right are clearly within the power of the legislature. These are not to be affected. It cannot be too strongly emphasized that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine.<sup>346</sup>

After quoting from Justice Sutherland's testimony at the 1924 Senate Hearing<sup>347</sup> and a Supreme Court decision,<sup>348</sup> and to eluci-

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<sup>337</sup> 53 A.B.A. REP. 139 (1928).

<sup>338</sup> *Id.*; *Report of the Committee on Uniform Judicial Procedure*, 53 A.B.A. REP. 500, 501 (1928).

<sup>339</sup> See 69 CONG. REC. 3663 (1928). The bill number was S. 759. *Id.*

<sup>340</sup> See S. REP. NO. 440, 70th Cong., 1st Sess. 1 (1928) [hereinafter cited as 1928 SENATE REPORT], reprinted in 55 A.B.A. REP. 524-61 (1930).

<sup>341</sup> See *id.* 2-15; *supra* note 296.

<sup>342</sup> 1928 SENATE REPORT, *supra* note 340, at 2.

<sup>343</sup> *Id.* pt. 2.

<sup>344</sup> *Id.* 15.

<sup>345</sup> *Id.* 16.

<sup>346</sup> *Id.*

<sup>347</sup> See *id.*; *supra* text accompanying note 272.

<sup>348</sup> See 1928 SENATE REPORT, *supra* note 340, pt. 2, at 16. The quotation was from *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1924).

date further the intended scope of the authority conferred, the minority addressed "some of the specific matters cited in the majority report as stumbling blocks in the way of the proposed system."<sup>349</sup> Referring to prior federal classifications and the experience in states where rulemaking power had been conferred, it concluded that none of those matters was within the Cummins bill's rulemaking grant.<sup>350</sup>

The Cummins bill did not come to a vote in 1928 or 1929. The reports of the ABA Committee on Uniform Judicial Procedure in those years were the standard fare,<sup>351</sup> urging passage of the Cummins bill, but Shelton's remarks in presenting the 1929 report were not. His frustration was evident, but dominant was the theme that "we are just beginning."<sup>352</sup>

In fact, however, Shelton's career as chairman of the ABA Committee was over, and with his passing from the post, the Committee recommended a change in strategy. Its 1930 report<sup>353</sup> noted that the new chairman had spent some days interviewing senators and representatives, as well as conferring with Shelton. On the basis of those conferences and conversations, the Committee concluded that the prospects of the uniform federal procedure bill were less favorable than in the past; it recommended that, until such time as they appeared favorable to passage, efforts should be limited to having the bill introduced and "keeping in touch with the situation."<sup>354</sup> The Committee's resolution carried.<sup>355</sup>

## F. Defeat and Victory: 1931-1934

### 1. The Lean Years: 1931-1933

The early thirties were lean years for the movement supporting court rulemaking, at both the federal and state levels.<sup>356</sup> Al-

<sup>349</sup> 1928 SENATE REPORT, *supra* note 340, pt. 2, at 17.

<sup>350</sup> See *id.* In concluding the section on "Scope of Rules," the minority quoted from the favorable 1926 Senate Report. See *id.*; *supra* text accompanying note 316. Section 2 was, typically, treated by the 1928 minority as non-controversial. The minority merely quoted from the 1926 Senate Report, which described it as such. See 1928 SENATE REPORT, *supra* note 340, pt. 2, at 24.

<sup>351</sup> See Report of the Committee on Uniform Judicial Procedure, 53 A.B.A. REP. 500 (1928); Report of the Special Committee on Uniform Judicial Procedure, 54 A.B.A. REP. 514 (1929).

<sup>352</sup> 54 A.B.A. REP. 131 (1929) (remarks of Mr. Shelton).

<sup>353</sup> Report of the Committee on Uniform Judicial Procedure, 55 A.B.A. REP. 521 (1930).

<sup>354</sup> *Id.*; see *id.* 91.

<sup>355</sup> See *id.* 92.

<sup>356</sup> The experience at the federal level is chronicled in the ABA documents cited *infra* notes 358-59. The situation in the states may be surmised from the

though the 1931 report of the ABA Committee on Uniform Judicial Procedure gave some grounds for optimism,<sup>357</sup> another change in personnel brought to the chair a federal district judge who was personally opposed to the uniform federal procedure bill; he suggested that attempts to secure its passage would be unavailing and indeed might improve the chances of pending legislation to abolish diversity-of-citizenship jurisdiction.<sup>358</sup> In 1933, the chairman neglected to file a written report. He said, however, that notwithstanding the death of Senator Walsh, the uniform federal procedure bill would not pass and that there was no longer any need for the Committee on Uniform Judicial Procedure.<sup>359</sup> There being no motion to continue the Committee, it lapsed.<sup>360</sup>

## 2. Homer Cummings and Passage of the Act

Just as the change in leadership of the ABA Committee on Uniform Judicial Procedure very quickly brought a change in the ABA's position on the uniform federal procedure bill, so was Senator Walsh's death in 1933<sup>361</sup> quickly followed by a change of position in Congress. His death brought to the office of Attorney General, for which Walsh himself had been chosen, Homer Cummings, a person who would fill the leadership vacuum in the

dearth of articles and editorials in volumes 14 through 16 (1930-1933) of the *Journal of the American Judicature Society*. See *supra* notes 224 & 325.

<sup>357</sup> See *Report of the Special Committee on Uniform Judicial Procedure*, 56 A.B.A. REP. 487-89 (1931). One of the hopeful matters mentioned by the Committee was a project of the Conference of Senior Circuit Judges "to secure legislation authorizing them to recommend changes in the practice and procedure in the federal courts." *Id.* 488. Fish reports that during this period Chief Justice Hughes refused to join those who asserted inherent rulemaking power but that, after the ABA's campaign "languished," Hughes "took up the torch" and "[f]or four years . . . unsuccessfully sought to lodge the rule-making power in the Judicial Conference." P. FISH, *supra* note 41, at 63 (footnote omitted). Fish seems to have confused the rulemaking power with the power to make recommendations for legislation. His cited sources do not support his assertions as to the former. Moreover, Hughes' unwillingness "to take part in any promotion of the [rulemaking] legislation or to be quoted with reference to it" had been reported in his presence at the 1930 ABA annual meeting. 55 A.B.A. REP. 91 (1930); cf. 1936 Report of the Committee on Rule-Making Power and Judicial Councils 2, reprinted in 21 MASS. L.Q. 66 (1936).

<sup>358</sup> See 57 A.B.A. REP. 117-19 (1932); *Report of the Special Committee on Uniform Judicial Procedure*, 57 A.B.A. REP. 575-76 (1932). The new chairman, Judge McClintic, had responded to Walsh's 1926 letter, see *supra* note 296, vigorously opposing the uniform federal procedure bill. See letter from the Hon. George W. McClintic to the Hon. Thomas J. Walsh (May 20, 1926) (Walsh Papers, *supra* note 154, Container 302).

<sup>359</sup> See 58 A.B.A. REP. 108-10 (1933).

<sup>360</sup> See *id.* 110.

<sup>361</sup> See 19 A.B.A. J. 197 (1933).

reform movement created when the ABA Committee on Uniform Judicial Procedure lapsed.

In an address to the New York County Lawyers' Association on March 14, 1934, Attorney General Cummings declared that he supported the uniform federal procedure bill and had suggested its reintroduction to the "Chairmen of the appropriate Senate and House committees."<sup>362</sup> Moreover, he announced that the proposed reform was endorsed by President Roosevelt.<sup>363</sup> The practical and theoretical reasons for his position given in that address and elsewhere were those that had animated the ABA's campaign for years.<sup>364</sup> Indeed, Cummings saw himself as reviving the ABA's campaign and, with the advantages of his position and political approach, leading it to a successful conclusion.<sup>365</sup>

Success was "startingly sudden."<sup>366</sup> The Senate Judiciary Committee favorably reported the bill, referred to its attention by Cummings, on May 18, 1934.<sup>367</sup> The report, occupying less than a page, did little more than reprint Cummings' covering letter.<sup>368</sup> The House Judiciary Committee followed suit on May

<sup>362</sup> SELECTED PAPERS OF HOMER CUMMINGS 182, 184 (C. Swisher ed. 1939).

<sup>363</sup> See *id.*

<sup>364</sup> See *id.* 182-84; Cummings, *The New Law Relating to Federal Procedure*, 1 U.S.L.W. 926 (1934).

<sup>365</sup> See sources cited *supra* note 364; Cummings, *supra* note 218, at 19-20, reprinted in 24 A.B.A. J. at 885-86. See also Address of Chief Justice Hughes to the American Law Institute, reprinted in 21 A.B.A. J. 340 (1935):

This statute was the result of long effort. For many years the American Bar Association had sought action by Congress to obtain uniformity of federal procedure in actions at law by conferring upon the Supreme Court the requisite rule-making power, similar to the power possessed by the Court as to practice in equity cases. But the proposal was strongly and persistently opposed and the final achievement in the passage of this measure is no doubt attributable to the earnest and persuasive efforts of the Attorney General.

Occasionally, however, Cummings allowed himself to be carried away, suggesting a greater role in the *drafting* of the bill introduced than was warranted. See, e.g., Cummings, *Modernizing Federal Procedure*, 63 A.B.A. REP. 716, 719 (1938). As indicated *infra* text accompanying note 375, the statute Cummings caused to be introduced was the Cummins bill, with one minor change.

<sup>366</sup> *Congress Strengthens the Machinery of Justice*, 20 A.B.A. J. 422, 422 (1934).

<sup>367</sup> See 78 CONG. REC. 9070 (1934).

<sup>368</sup> See S. REP. NO. 1049, 73rd Cong., 2d Sess. (1934) [hereinafter cited as 1934 SENATE REPORT]. The letter follows:

30, 1934, in a report of two pages,<sup>369</sup> one of which reprinted an identical letter and the 1934 Senate Report.<sup>370</sup> The debate in both the Senate and the House was perfunctory.<sup>371</sup> The bill passed in the Senate on May 23, 1934,<sup>372</sup> and in the House on June 8.<sup>373</sup> It was signed by the President eleven days later.<sup>374</sup> In less than three months, Cummings had secured what the ABA had sought for more than twenty years. The Act, identical to the bill introduced by Senator Cummins in 1924 with the addition of one word, provided:

*Be it enacted, etc.,* That the Supreme Court of the United States shall have the power to prescribe by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process,

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Department of Justice  
Washington, DC March 1, 1934

Honorable Henry F. Ashurst  
Chairman Committee on the Judiciary,  
United States Senate, Washington, D.C.

MY DEAR SENATOR: I enclose herewith a draft of a bill to empower the Supreme Court of the United States to prescribe rules to govern the practice and procedure in civil actions at law in the district courts of the United States and the courts of the District of Columbia. The enactment of this bill would bring about uniformity and simplicity in the practice in actions at law in Federal courts and thus relieve the courts and the bar of controversies and difficulties which are continually arising wholly apart from the merits of the litigation in which they are interested. It seems to me that there can be no substantial objection to the enactment of a measure which would produce so desirable a result, which, apart from its inherent merit, would also, it is believed, contribute to a reduction in the cost of litigation in the Federal courts.

I request that you introduce the enclosed bill and hope that you may be able to give it your support.

Sincerely yours,

HOMER CUMMINGS, Attorney General.

<sup>369</sup> See H.R. REP. No. 1829, 73rd Cong., 2d Sess. (1934) [hereinafter cited as 1934 HOUSE REPORT].

<sup>370</sup> See *id.* 2. The remainder of the Report paraphrased the bill, predicted that it would "promote simplicity and uniformity of practice in all Federal Courts," and described the prevailing practice at law and in equity. *Id.* 1. Although the Report also stated that the Attorney General had appeared before the House Judiciary Committee in support of the bill, *id.*, there is no printed record of hearings in either the House or the Senate.

<sup>371</sup> In both, an objection that the bill could cause inconvenience to local lawyers was made and withdrawn. See 78 CONG. REC. 9362 (1934) (remarks of Sen. Adams); *id.* 10,866 (remarks of Rep. Eltse). Senator Ashurst assured his colleagues that the bill "does not deprive any State or any citizen of any vital right," that it "does not in any sense destroy or abridge any right or any statute of any State," and that "the Supreme Court of the United States could not make a rule that would violate any law of any State or of the United States." 78 CONG. REC. 9362 (1934).

<sup>372</sup> See 78 CONG. REC. 9363 (1934).

<sup>373</sup> See 78 CONG. REC. 10,866 (1934).

<sup>374</sup> 20 A.B.A. J. 460 (1934).



writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however*, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.<sup>375</sup>

#### IV. THE RULES ENABLING ACT REINTERPRETED IN LIGHT OF THE PRE-1934 HISTORY

##### A. *The Interpretive Value of the Act's Antecedent Period of Travail*

##### 1. Relevance

##### a. *The Pre-1934 Materials*

The legislative materials arising out of the consideration of the bill introduced at the behest of Attorney General Cummings in 1934 provide only the most general sense of the statute's meaning.<sup>376</sup> Those materials do not speak to the question posed in *Sibbach v. Wilson & Co.*, and they do not speak to numerous other problems that have since been identified in the interpretation of the Act.<sup>377</sup> Where the reports and debate preceding pas-

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<sup>375</sup> Cf. S. 2061, set forth *supra* note 268. The addition of the word "civil" in § 1 made it consistent with § 2. It may also have been designed to make clear that the bill did not authorize rules in criminal actions. A 1925 Washington statute modeled on the Sutherland bill had been interpreted to include rulemaking authority in criminal as well as civil cases. See 12 J. AM. JUDICATURE Soc'y 70 (1928); see also Paul, *supra* note 277, at 234; Wickes, *supra* note 36, at 2.

<sup>376</sup> See *supra* text accompanying notes 35 & 366-73.

<sup>377</sup> An argument from silence would decline to attribute to Congress an intention to impose restrictions on the delegation which were not elaborated in 1934 that might impede the effectuation of the Act's general purposes, which were. See *supra* notes 368 & 370. In describing the bill, the House Report did note, but did not elaborate, the restriction contained in the second sentence of the bill. The argument should be rejected because it ignores the speed with which the Attorney General's bill was considered and enacted. See *supra* text accompanying notes

sage of legislation by Congress have been similarly uninformative, the Court has considered more detailed materials from prior sessions of Congress. At least it has done so with respect to language that "crystallized" at an earlier time and appeared in the bill when enacted,<sup>378</sup> where "the essence of the legislation remained constant,"<sup>379</sup> or where "the operative language of the original bill was substantially carried forward into the Act."<sup>380</sup>

In the case of the Rules Enabling Act of 1934, the bill before Congress remained essentially unchanged from 1924.<sup>381</sup> There are available as aids to its interpretation lengthy hearings, including one session presided over by its draftsman, and detailed reports, including one written by its draftsman.<sup>382</sup> Although there was a gap of some years between these considered explications of the bill's provisions and its enactment, and although they were not specifically referred to in the scanty materials produced in 1934, nothing happened in the meanwhile to suggest that in using the identical language Congress sought to achieve different purposes, or to rob some of that language of its meaning.<sup>383</sup> On the contrary, for some of that period the campaign for passage of the

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366-75; see also Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 396 (1936) (suggesting that the "easy passage" of the Act was due to "paramount problems of economic maladjustment"); J. WEINSTEIN, *supra* note 3, at 67. Moreover, it ignores the fact that the Attorney General himself was the prime source relied on by the House and Senate Judiciary Committees and that he did not purport to describe the legislation except in the most general terms. See *supra* text accompanying notes 368 & 370.

<sup>378</sup> *T.W.A., Inc. v. Civil Aeronautics Board*, 336 U.S. 601, 605-06 n.6 (1949).

<sup>379</sup> *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980).

<sup>380</sup> *United States v. Enmons*, 410 U.S. 396, 404-05 n.14 (1973).

<sup>381</sup> See *supra* text accompanying note 375.

<sup>382</sup> See *supra* text accompanying notes 268 & 297.

<sup>383</sup> As to references to prior material in the year of enactment, compare *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 204 (1980) and *United States v. Enmons*, 410 U.S. 396, 405 n.14 (1973). But see *id.*: "Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand, as the dissent would have it, simply because the interpretation was given two years earlier." In *Enmons* the legislative history (of the Hobbs Act) in the year of passage was considerably more extensive than the 1934 legislative history of the Rules Enabling Act, which may explain why Justice Douglas, who wrote the opinion of the Court in *T.W.A., Inc. v. Civil Aeronautics Board*, was of the view that "the most relevant legislative history . . . concerns the 79th Congress, not the 78th." *Enmons*, 410 U.S. at 414. In any event, Douglas cannot fairly be said to have "dismissed" the latter "out of hand."

Although the prior legislative hearing and reports on the Cummins bill were not mentioned in the 1934 legislative material, the fact that the ABA and others had recommended the provisions of the bill "for a good many years" was. 78 CONG. REC. 9362 (1934); see also *id.* 10,866. On the significance, if any, of intervening events, see *infra* notes 385 & 426.

uniform federal procedure bill was actively pressed in Congress,<sup>384</sup> and the bill's legislative sponsors in 1934 were both well acquainted with that campaign.<sup>385</sup> Moreover, in 1934 and thereafter Attorney General Cummings made it clear that he was doing nothing more than resuscitating the previous effort.<sup>386</sup>

The voluminous materials concerning the uniform federal procedure bill produced by the ABA, in particular the ABA Committee on Uniform Judicial Procedure, are also relevant to the interpretation of the Act.<sup>387</sup> Such extra-legislative materials

<sup>384</sup> See *supra* text accompanying notes 320-52.

<sup>385</sup> Senator Ashurst, who reported S. 3040 for the Judiciary Committee and brought it to a vote on the floor in 1934, see *supra* notes 368 & 371, had voted with the majority to report the Cummins bill adversely in 1928. See S. REP. NO. 440, 70th Cong., 1st Sess. 1 (1928). Representative Sumners, who was the House manager, see *supra* notes 368-71, had been on the House Judiciary Committee, before which the uniform federal procedure bill was pressed, for years. See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 47 A.B.A. REP. 370, 373 (1922). Moreover, he apparently was a supporter. See letter from Thomas W. Shelton to the Hon. Hatton W. Sumners (June 29, 1926) (Cummins Papers, *supra* note 260).

<sup>386</sup> See *supra* text accompanying note 365. It might be suggested that the 1934 Congress intended a broad delegation in the area of judicial procedure, similar to the delegations it was making at that time in other areas. See Clinton, *supra* note 13, at 74-75. But see *supra* note 166. That view neglects the general recognition that the Act was merely the culmination of a long campaign. Moreover, the history of the campaign hardly bespeaks a shared perception, at least in Congress, of serious dislocations such as prompted those broad delegations. Indeed, it has been suggested that Congress's preoccupation with the economic and social problems of the Depression led it to pass the Act in 1934 with little attention. See *supra* note 377. Congress's change of heart is probably attributable to Senator Walsh's death, Cummings' political skills, and the support of President Roosevelt. See *supra* text accompanying note 363; *supra* note 218. "[B]ut even this could not have availed had there been no Shelton to fight on year after year and to at least keep the need before the profession." *Rule-Making Authority for Federal Courts*, 18 J. AM. JUDICATURE SOC'Y 37, 38 (1934).

<sup>387</sup> See generally 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.11 (4th ed. 1973); Note, *Nonlegislative Intent as an Aid to Statutory Interpretation*, 49 COLUM. L. REV. 676 (1949).

Dean Clark, the Reporter of the original Advisory Committee, argued that "in this case where the statute was enacted without any real discussion, such intent [the 'intent of the legislature'] must be traced to the Association's draftsmen." Clark, *Supreme Court Power*, *supra* note 41, at 1304. However, there are numerous problems with his reasoning. First, the Act was not drafted by the ABA. See *supra* text accompanying notes 253-268. Second, Clark ignored the pre-1934 legislative history, which surely must be accorded more weight, and of which he was aware. See, e.g., Clark & Moore, *supra* note 36, at 394 n.30. Third, even with reference to the ABA materials, he paid attention only to general purposes thought to be reflected there. See Clark, *Supreme Court Power*, *supra* note 41, at 1304-05, 1307-08. Attention to specific purposes evident in the reports of the ABA Committee on Uniform Judicial Procedure, let alone in the pre-1934 legislative history, would not, for instance, have permitted Clark to support the view that the Act authorizes rules of admissibility of evidence. Compare *id.* 1311 with *infra* text accompanying notes 516-18.

Compare Dean Clark's use of the ABA materials with that suggested by Ohlinger, *supra* note 36, at 478-80. Ohlinger also adduced the pre-1934 legislative history. See *id.* 478 n.79.

are independently important, however, only where congressional materials on a question are "unavailable or indecisive."<sup>388</sup>

Finally, it is permissible to look, in cases of ambiguity, "to the public history of the times in which [the legislation being interpreted] was passed."<sup>389</sup> Indeed, historical and jurisprudential perspectives are essential to an understanding of the circumstances from which the language of the Act drew much of its meaning.<sup>390</sup>

"It is a delicate business," Justice Holmes observed, "to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage."<sup>391</sup> Holmes was responding to an argument that relied on changes in the language of an amendment to the legislation being construed.<sup>392</sup> Where the language in successive versions of a bill has not changed, or has done so only in immaterial respects, and where the only informative materials attend the earlier versions, the business of considering those materials in interpreting the legislation is also delicate. But it is essential if the process is even to attempt to remain faithful to the legislative will.

#### b. *The Post-1934 Developments*

The argument can be made that, although the pre-1934 history once was relevant to the interpretation of the Act, developments since 1934 have rendered it solely of historical interest. The argument is not without force, but it is ultimately unconvincing.

Certainly, one should not be deterred from reexamining the meaning of the Act's limitations by the reality of more than forty years of Supreme Court interpretations in promulgating Federal Rules and amendments, and in adjudicating challenges to their validity. The statutory limitations in question were intended to confine the power of the Court itself, a fact that requires that the Court ever be open to the reconsideration of past interpreta-

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<sup>388</sup> Note, *supra* note 387, at 685. The interpretive relevance of the ABA materials is not of concern to the extent that they were incorporated in the pre-1934 legislative materials, *see supra* text accompanying note 317, or are relied on solely for confirmation.

<sup>389</sup> *Aldridge v. Williams*, 44 U.S. (3 How.) 8, 23 (1845); *see also* *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979).

<sup>390</sup> *See* *United States v. Wise*, 370 U.S. 405, 411 (1962); *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 323-25 (1961); *DuParquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218-21 (1936); *see also* H. FRIENDLY, *supra* note 38, at 212-15.

<sup>391</sup> *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922).

<sup>392</sup> *See id.* 195-96.

tions on sufficient demonstration that it has erred in ascertaining the statute's meaning.<sup>393</sup> This general proposition takes on additional force in the context of the Rules Enabling Act of 1934, given that the Court has *never* considered the materials that are relevant to the Act's interpretation.<sup>394</sup>

Congress's failure to block Federal Rules and amendments and its failure legislatively to overrule the Court's decisions construing the Act should not be regarded as ratification of the Court's interpretations of the scope of its rulemaking power under the Act, even when contrasted with those recent instances in which Congress did not acquiesce in proposed Federal Rules. Justice Frankfurter's dissent in *Sibbach v. Wilson & Co.* pointed out the dubiety of equating Congress's failure to act with its approval of Federal Rules.<sup>395</sup> Professor Mishkin has since reasserted the weaknesses of the general proposition.<sup>396</sup> In overcoming institutional inertia to block the proposed Federal Rules of Evidence, Congress responded to considerations the very multitude and variousness of which suggest the insignificance of its traditional posture.<sup>397</sup> It is difficult to disagree with Judge Friendly: "Even as to decisions of the highest court, the 'silence' principle should be limited to the rather rare case where the history fairly supports the inference of legislative rejection of a proposal for change rather than more likely inferences of ignorance, indifference or inertia . . . ." <sup>398</sup>

Finally, none of the post-1934 actions taken by Congress with respect to the Rules Enabling Act signifies congressional approval of the Court's interpretations, implicit or explicit, of the limitations on rulemaking which the Act imposes.

<sup>393</sup> Where "the limits are being imposed on the courts themselves . . . the judicial constraints to act in accordance with legislatively imposed limits should be even stronger in order to counter the inherent tendency of any institution to extend its own reach and power." Mishkin, *supra* note 82, at 1687.

<sup>394</sup> See *supra* text accompanying note 56.

<sup>395</sup> 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

<sup>396</sup> See Mishkin, *supra* note 82, at 1687-88 (citing H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1394-1401 (tent. ed. 1958) and P. MISHKIN & C. MORRIS, *ON LAW IN THE COURTS* 481-84 (1965)). The experience of the original Federal Rules of Civil Procedure before Congress provides specific support for the rejection of an argument equating congressional inaction with congressional approval. See *infra* text accompanying notes 699-704.

<sup>397</sup> See 21 C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE* § 5006, at 101-07 (1977).

<sup>398</sup> H. FRIENDLY, *supra* note 38, at 233 (footnote omitted).

In the 1948 revision of the Judicial Code, the Act as codified was consolidated with parts of other sections of title 28.<sup>399</sup> There were two changes of possible relevance for these purposes. First, the reference to "the substantive rights of any litigant" in the second sentence of the 1934 Act became "any substantive rights." This change was not explained in the Reviser's Note; presumably, therefore, it was considered one of the "[c]hanges . . . made in phraseology."<sup>400</sup> A more interesting change was the addition of the sentence, "Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court." Added by a Senate amendment, and thus not treated in the Reviser's Note, this provision was thought to be "necessary in order to make clear that no provisions of the existing Federal Rules of Civil Procedure . . . are amended or otherwise affected by this bill."<sup>401</sup> The amendment was not specifically discussed in either house.<sup>402</sup> It bespeaks caution appropriate for a legislative undertaking of such scope and complexity, not a judgment that any particular Federal Rule was, let alone that all of them were, valid.<sup>403</sup>

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<sup>399</sup> See Act of June 25, 1948, ch. 646, § 2072, 62 Stat. 961 (codified at 28 U.S.C. § 2072 (1976)).

<sup>400</sup> Reviser's Note to § 2072, H.R. REP. No. 308, 80th Cong., 1st Sess. A170 (1947). For a discussion of this change, see Wellborn, *supra* note 82, at 405-06. For a discussion of the weight to be given the Reviser's Notes in statutory interpretation, see J. MOORE, MOORE'S JUDICIAL CODE ¶ 0.03(11), at 77-78 (1949).

<sup>401</sup> S. REP. No. 1559, 80th Cong., 2d Sess. 8 (1948). A similar provision was added to § 2073, dealing with admiralty rules. See *id.*

<sup>402</sup> Approximately eighty amendments to H.R. 3214, the bill passed by the House, were made by the Senate Judiciary Committee. They were agreed to en bloc in the Senate. See 94 CONG. REC. 7927-30 (1948). Thereafter, the House concurred in the amendments. See *id.* 8498-501. It appears that the amendment in question was one of a number submitted by the Reviser which were collectively described as "perfecting amendments of a wholly noncontroversial character which further study of the bill has indicated would be desirable." *Hearings on H. 3214 Before a Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 2d Sess. 27 (1948).

<sup>403</sup> The inference from reenactment to congressional approval is particularly attenuated in connection with any "revision and codification of an entire branch of statutory law," which, "[i]f it is to be carried through successfully . . . must usually be placed on a plane of high public interest above the levels of ordinary partisan contest." H. HART & A. SACKS, *supra* note 396, at 1402. The 1948 revision of the Judicial Code was no exception, and the special precaution taken by Congress with respect to the Federal Rules provides no additional ground for an inference of approval. Representative Keogh, the Chairman of the House Committee on Revision of the Laws, explained: "The policy that we adopted, which in my mind has been very carefully followed by the revisers . . . was to avoid wherever possible and whenever possible the adoption in our revision of what might be described as controversial substantive changes of law." *Hearing on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 80th Cong., 1st Sess.

None of the amendments to 28 U.S.C. § 2072 since 1948 has involved the Act's basic limitations on rulemaking.<sup>404</sup> In such circumstances, a principle of statutory interpretation equating reenactment or amendment with approval is equally without foundation in theory and in the assumptions of fact necessary to justify it.<sup>405</sup>

At the least, the reenactment principle should be rejected in the absence of legislative history indicating congressional approval of the Court's interpretations.<sup>406</sup> No such legislative history has been found in connection with the post-1934 amendments of the Act.<sup>407</sup> Again, Judge Friendly has the last word: "We ought not to get in the position where Congress reenacts a statute in the expectation that the courts will retain freedom to interpret it, but the courts deny themselves that freedom because of a supposition that Congress meant them not to have it."<sup>408</sup>

## 2. Weight

Even though, as a legal matter, the pre-1934 history of the Act is relevant to its interpretation, numerous considerations, aris-

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6 (1947). Subsequently, Representative Robsion, Chairman of Subcommittee No. 1, told the House: "It can be said truthfully that this bill is not a partisan bill in any respect." 93 CONG. REC. 8385 (1947).

The strongest case for an inference of approval in connection with the 1948 revision is presented by congressional repeal of a statute thought to have been superseded under the terms of the 1934 Act by a Federal Rule. Even in such a case, there is reason to question whether Congress's action should foreclose a subsequent determination of the Rule's invalidity. See *infra* note 608.

<sup>404</sup> See Act of May 24, 1949, ch. 139, § 103, 63 Stat. 104 (requiring direct reporting by the Chief Justice to Congress and eliminating Attorney General as the transmitting agent); Act of July 18, 1949, ch. 343, § 2, 63 Stat. 446 (making § 2072 applicable to the District Court for the Territory of Alaska); Act of May 10, 1950, ch. 174, § 2, 64 Stat. 158 (allowing reporting of proposed Federal Rules to Congress not later than May 1 of each year, to become effective 90 days after they have been reported); Act of July 7, 1958, Pub. L. No. 85-508, § 12(m), 72 Stat. 348 (eliminating provisions relating to the District Court for the Territory of Alaska); Act of Nov. 6, 1966, Pub. L. No. 89-773, § 1, 80 Stat. 1323 (extending rulemaking power under § 2072 to admiralty and maritime cases, appeals in civil actions (including admiralty and maritime cases), proceedings for review of Tax Court decisions and for judicial review or enforcement of orders of administrative agencies, boards, commissions, or officers).

<sup>405</sup> See H. HART & A. SACKS, *supra* note 396, at 1403-04.

<sup>406</sup> See H. FRIENDLY, *supra* note 38, at 232.

<sup>407</sup> Note, however, the general observation that "[t]he Federal Rules of Civil Procedure have worked with great success to improve the administration of justice" and the conclusion that "[t]here seems no doubt that their application by the courts of Alaska will be to the advantage of lawyers, litigants, and the general public." H.R. REP. NO. 959, 81st Cong., 1st Sess. 2 (1949).

<sup>408</sup> H. FRIENDLY, *supra* note 38, at 232-33.

ing from events before and after 1934, affect the weight it should be accorded in that enterprise.

The pre-1934 history reveals a borrowing from state sources that is replete with theoretical and practical difficulties.<sup>409</sup> It also affords room for doubt as to the care and conviction with which the supporters of the uniform federal procedure bill articulated the bill's limitations on court rulemaking.<sup>410</sup>

Experience under the Act since 1934 may not preclude re-interpretation, but it surely furnishes strong practical arguments against, at the least, the invalidation of Federal Rules whose validity has been adjudicated or generally assumed.<sup>411</sup> Moreover, during that period our thinking about procedure—indeed about law—has changed.<sup>412</sup> We may fairly question the sense of an attempt to define in advance the boundaries of court rulemaking,<sup>413</sup> as well as the usefulness of any such attempt in 1926 or 1934 for present needs and conditions.<sup>414</sup>

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<sup>409</sup> See *infra* text accompanying notes 502-10 & 733-35.

<sup>410</sup> See *infra* text accompanying notes 519-24. It is true that the debate about the uniform federal procedure bill was, for the most part, conducted at a high level of generality. But the motives of the supporters of the bill in maintaining that level of discourse are as important to explore as Senator Walsh's motives in insisting on particulars.

For some, generality was probably the counsel of convenience and political success. The task of reducing to specifics the limitations on court rulemaking was not easy, at least after the bill had been rewritten in 1923, and the enterprise entailed the risk of arousing opposition. Cf. H. FRIENDLY, *supra* note 38, at 128 (prospect of opposition to legislation evokes "compromise or even . . . unintelligibility in the text").

For others, generality was probably also the best hope of significant power for the Supreme Court and hence, in their view, of truly effective reform. Indeed, it has recently been suggested that Shelton "painted a bright line between procedure and substance" and that "[t]his was in part a transparent attempt to convince Congress that it was not giving up much power by enabling the Supreme Court to draft procedural rules." Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1651 (1981). The suggestion appears to attribute legal realism to a person whose writings, as Professor Subrin himself recognizes, see *id.* 1650-51, hardly bespeak it. Moreover, a bright line approach could work both ways: witness the classification of evidence. See *supra* text accompanying note 237; *infra* text accompanying notes 516-18. In any event, the point may be valid if confined to the generality of the debate.

<sup>411</sup> Apart from the practical concerns that usually animate the doctrine of *stare decisis*, see *infra* note 632, it is important to consider the disruption of national uniformity that might attend the invalidation of numerous Federal Rules. Many states have used the Federal Rules of Civil Procedure as a model. See, e.g., Rowe, *A Comment on the Federalism of the Federal Rules*, 1979 DUKE L.J. 843, 843.

<sup>412</sup> See, e.g., Subrin, *supra* note 410, at 1651.

<sup>413</sup> But the logical and practical difficulties of classifying a matter as procedure or substance are not sufficient reason to abandon the enterprise, at least when it is required by statute. See Ely, *supra* note 3, at 724; *infra* text accompanying note 742.

<sup>414</sup> See *infra* text accompanying notes 738-83.



It is not my purpose here to resolve all of these problems. Some of them are taken up in connection with particular matters on which they bear. Others are left for further research. The confidence with which one can draw conclusions from the pre-1934 history varies considerably with the question that is asked. Let us ask the questions. There will be time enough to debate the accuracy and pertinence of the answers.

### B. *The Purpose of the Procedure/Substance Dichotomy*

Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy in the first two sentences was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress. The pre-1934 history also makes clear that the protection of state law was deemed a probable effect, rather than the purpose of, a limitation designed to allocate lawmaking power between federal institutions.

#### 1. Allocation of Lawmaking Power Between the Supreme Court as Rulemaker and Congress

From the beginning, a stated goal of the ABA's campaign for the uniform federal procedure bill was to achieve an "equable division" of power and responsibility between the courts and Congress in the regulation of procedure.<sup>415</sup> The language used by Shelton and the 1914 House Judiciary Committee to describe the purposes and effects of the allocation scheme in the Clayton bill was borrowed from the 1912 New York Report, which was imbued with concern about the appropriate allocation of matters between the courts exercising rulemaking power and the legislature.<sup>416</sup> When the uniform federal procedure bill was redrafted in 1923, its draftsman, Senator Cummins, expressed particular concern that Congress not be thought to have delegated to the Supreme Court legislative power; he indicated that he had inserted the second sentence specifically to emphasize that limitation and thus to quell potential opposition.<sup>417</sup> The 1924 Senate Hearing<sup>418</sup> and con-

<sup>415</sup> 1914 *House Hearings*, *supra* note 154, at 22, *quoted supra* text accompanying note 160.

<sup>416</sup> See *supra* text accompanying notes 182-86. "And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947).

<sup>417</sup> See *supra* text accompanying note 260. Cummins' privately expressed views as draftsman of the bill are relied on only to the extent that they are consistent with the pre-1934 legislative history.

<sup>418</sup> See *supra* text accompanying notes 269-76.

temporary literature<sup>419</sup> confirm that "procedure" and "substantive rights," as used in the Cummins bill, were understood to demarcate the spheres of lawmaking appropriate for the Supreme Court acting as rulemaker and for Congress.

In the most detailed and informative of all the legislative materials concerning the bill that became the Act,<sup>420</sup> the Senate Judiciary Committee devoted considerable attention to the articulation of the limitations on court rulemaking imposed by the Cummins bill. The purpose of those limitations, as marking the boundary for the delegation of legislative power, was repeatedly made clear by direct assertion,<sup>421</sup> by reference to state models wherein no other purpose is conceivable, including in particular the model proposed in the 1915 New York Report,<sup>422</sup> and by incorporation of standard ABA language that was originally borrowed from, and continued to be informed by, the work of the New York Board of Statutory Consolidation.<sup>423</sup>

## 2. The Act's Second Sentence is Surplusage

It also appears that the Supreme Court was correct in *Sibbach* and subsequent cases to the extent that it failed to attribute independent meaning to the Act's second sentence, and thus to impute to the second sentence limitations not imposed by the first.<sup>424</sup>

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<sup>419</sup> See *supra* text accompanying note 279.

<sup>420</sup> In light of Senator Cummins' role in these matters, and of the origin of the 1928 Senate Report, which did little more than reprint the 1926 Senate Minority Report, see *supra* text accompanying notes 340-42, one can fairly, and should, look to the 1926 Senate Report (and not to the 1928 Senate Report) for guidance.

[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 . . .

*NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964). The Minority Views to the 1928 Senate Report were generally consistent with the 1926 Senate Report. See *supra* text accompanying notes 343-50.

<sup>421</sup> See 1926 SENATE REPORT, *supra* note 297, at 9, 11, 12; *supra* text accompanying notes 304-17.

<sup>422</sup> See 1926 SENATE REPORT, *supra* note 297, at 10-11; *supra* text accompanying notes 313-16. Specifically, federalism was obviously not a concern for those who fashioned the state models relied on in the 1926 Senate Report.

<sup>423</sup> See 1926 SENATE REPORT, *supra* note 297, at 12; *supra* text accompanying note 317.

<sup>424</sup> See 312 U.S. at 11, 13-14. But see *Ely*, *supra* note 3, at 698, 733.

In the opinion of the draftsman, as indicated in his correspondence, the second sentence served only to emphasize a restriction inherent in the use of the word "procedure" in the first sentence.<sup>425</sup> Neither at the 1924 Senate Hearing nor in the contemporary literature was the second sentence thought to perform any additional function.<sup>426</sup> The matter comes more clearly into focus in the 1926 Senate Report, where the Committee reasoned that an expansive interpretation of the first sentence would ignore the second<sup>427</sup> and indicated that it had in mind "procedure" of a particular kind—the kind elaborated by the ABA Committee on Uniform Judicial Procedure as the second class<sup>428</sup>—namely, procedure fit for regulation by rules of court.<sup>429</sup> In other words, the first sentence itself was thought to impose significant restrictions on court rulemaking.

### 3. Federalism

Thus, the Court in *Sibbach*, although correct in refusing to attribute independent significance to the second sentence of the Act, was clearly wrong when it linked the procedure/substance dichotomy with constitutional (or other statutory) limitations on federal lawmaking and neglected restrictions sought to be imposed by Congress on federal court rulemaking.<sup>430</sup> A number of recent commentators, seeking to invigorate the Act's limitations, have accepted the Court's erroneous view that the dichotomy has its roots in federalism concerns. Their method, again contrary to the lesson of the pre-1934 history, has been to parse the Act's first

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<sup>425</sup> See *supra* text accompanying note 260. This was also the view of Henry Taft, who provided assistance in the preparation of the 1926 Senate Report. See *supra* note 297.

<sup>426</sup> See *supra* text accompanying notes 269-79.

<sup>427</sup> See 1926 SENATE REPORT, *supra* note 297, at 9, 11; *supra* text accompanying notes 308-10.

<sup>428</sup> "The second concerns only the practice, the manner in which these things shall be done, that is the details of their practical operation." *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 517 (1920), quoted *supra* text accompanying note 237.

<sup>429</sup> See 1926 SENATE REPORT, *supra* note 297, at 9, 11; *supra* text accompanying notes 308-10. The 1926 Senate Report incorporated *verbatim* the description from the standard Committee on Uniform Judicial Procedure report quoted *supra* text accompanying note 237. See *supra* note 317.

<sup>430</sup> See *supra* text accompanying notes 57-66. In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court clarified the constitutional restraints on federal lawmaking and eliminated the Rules of Decision Act as a restraint on federal court rulemaking under the Rules Enabling Act. It adhered, however, to the correct view that the Rules Enabling Act's second sentence has no independent significance, as well as to the erroneous view that the procedure/substance dichotomy was designed to protect federalism. See *supra* text accompanying notes 72-82.

two sentences and to rely on the second sentence for the protection of "substantive" state policies.<sup>431</sup>

It is not surprising that the preservation of state law, as such, was not a primary concern when the Act was formulated or when it was passed. Even in 1934, *Erie* was four years away.<sup>432</sup> In the 1920's, *Swift v. Tyson* was in full bloom, and *Erie* was considered by most to be an impossibility.<sup>433</sup> Moreover, the Federal Rules

<sup>431</sup> See sources cited *supra* note 82; see also *infra* notes 495-96.

<sup>432</sup> Some commentators have recognized the problem but have nevertheless felt free, in light of the absence of useful legislative history in 1934, to interpret the Act's procedure/substance dichotomy as designed to protect federalism values. See, e.g., Ely, *supra* note 3, at 720-21; Note, *supra* note 69, at 1032-33; Note, *Congressional Control of Procedure in Diversity Cases*, 56 NW. U.L. REV. 565, 570 (1961).

<sup>433</sup> See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 524 (1928) (footnote omitted): "[Swift] is now too strongly imbedded in our law for judicial self-correction. Legislation should remove this doctrine, which, though derived from diverse-citizenship jurisdiction, denies its basis." In a footnote to the quoted passage, Frankfurter referred to a bill (S. 4333, 70th Cong., 1st Sess. (1928)) introduced by Senator Walsh on May 3, 1928. See 69 CONG. REC. 7688 (1928). The bill provided "[t]hat the decisions of the highest court of a State shall govern the courts of the United States in the ascertainment of the common law or general jurisprudence of such State." It apparently died in Committee, as did a bill (S. 96, 71st Cong., 1st Sess. (1929)) with the same title introduced by Walsh in the next session, and Frankfurter was a poor prophet. The explanation for both phenomena may be the same. The bill was drafted by Frankfurter himself and sent to Senator Walsh at the suggestion of Justice Brandeis. Letter from the Hon. Louis D. Brandeis to Felix Frankfurter (April 21, 1928), reprinted in 5 LETTERS OF LOUIS D. BRANDEIS 336-37 (M. Urofsky & D. Levy ed. 1978): "1. Answering your enquiry: I think it would be an excellent idea to draft a bill to correct the alleged rule acted on as to general law in the Black & White taxi case [Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U.S. 518 (1928)]. The draft bill should go to Sen. Tom Walsh. He sat through the reading of the opinions, seated in a front seat, & seemed much interested." Brandeis had written to Frankfurter on April 10 that "Holmes's dissent in the Black & White Taxi Cab Case will stand among his notable opinions. It was delivered with fervor." LETTERS OF LOUIS D. BRANDEIS, *supra*, at 335. In his opinion for the Court in *Erie Railroad Co. v. Tompkins*, Brandeis cited Frankfurter's 1928 article, see 304 U.S. 64, 73 n.6, 74 n.7, 77 n.21, as well as the bills introduced by Walsh, see *id.* 77 n.21. For a discussion of this instance of collaboration between Brandeis and Frankfurter, see Levy & Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252, 1276-77, 1290-91 (1980); see also B. MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* ch. 3 (1982); H. FRIENDLY, *supra* note 38, at 19-21. For criticism of Frankfurter's 1928 article, see Keefe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L.Q. 494, 504-05, 527-31 (1949).

Of course, the Frankfurter/Walsh bill and the other legislative efforts to overrule *Swift* referred to in *Erie*, see 304 U.S. at 77 n.21, as well as efforts to abolish diversity jurisdiction, see *id.* 77 & n.20, indicate that, in some quarters at least, the preservation of state law against encroachment was a matter of considerable interest and concern by the early nineteen-thirties. Moreover, it is true that Senator Ashurst was at pains to assure his colleagues in 1934 that the effect of S. 3040 would not be to "deprive any State or any citizen of any vital right." 78 CONG. REC. 9362 (1934). But he made the same assurances regarding "any law of any

contemplated by the Act were to apply in all civil actions tried in federal court, including those in which federal law furnished the rule of decision. If, as commentators have recently suggested, Congress's concern in formulating the procedure/substance dichotomy was the preservation of an enclave of state law in diversity cases,<sup>434</sup> the question arises whether Congress intended to impose any limitation at all on rulemaking in federal question cases. On that issue, recent commentators have been, understandably, less than clear.<sup>435</sup>

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State or of the United States," *id.*, and similar assurances had been provided in 1926 and in 1928, *see supra* text accompanying notes 306-16, 343-50 and note 385.

On the other hand, many accepted or embraced *Swift* and saw the Rules Enabling Act as a logical step in the "tendency in the history of this country . . . towards a uniformity in the law applicable in the trial of cases in the federal courts, rather than a conformity to state law, with respect to matters of substantive law, procedural law, and the law of evidence generally." Wickes, *supra* note 36, at 19-20; *see Jaffin, supra* note 2, at 518-20.

Finally, contemporary commentators recognized that the purpose of the Act's procedure/substance dichotomy was to allocate power between the Supreme Court and Congress. *See, e.g., Clark & Moore, supra* note 36, at 411; Jaffin, *supra* note 2, at 518 n.41; Ohlinger, *supra* note 36, at 449; Sunderland, *supra* note 166, at 405-06; *see also* Mitchell, *supra* note 268, at 197. Mr. Mitchell, chairman of the Advisory Committee, also was of the view that the Act's second sentence "was probably surplusage. If it had said 'pleading, practice and procedure' and stopped there, that would have excluded substantive rights, and furthermore constitutional limitations would have prevented Congress, even if it had tried, from delegating to the courts power to make rules of substantive law." PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES 183 (1938) [hereinafter cited as CLEVELAND INSTITUTE]. *See supra* text accompanying notes 424-29.

<sup>434</sup> *See supra* text accompanying notes 82 & 431.

<sup>435</sup> *See, e.g., Ely, supra* note 3, at 721 & n.153, 737 & nn.225 & 226; Chayes, *supra* note 82, at 742 n.8; Mishkin, *supra* note 82, at 1685-86; *see also supra* notes 59 & 71. "Federalism does matter, and we can better understand *why* it matters by seeking to grasp its historical dimension rather than resorting to ex cathedra assertions or mere expressions of faith." Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC. REV. 663, 713 (1980).

Prior to the decision in *Erie*, commentators generally recognized that, since the limitations imposed by the Act derive from notions about the delegation of legislative power, and whatever the precise contours of those limitations, they apply to Federal Rules no matter what the source of the rule of decision or the basis of federal jurisdiction. *See* sources cited *supra* note 433. The original Advisory Committee also appears to have recognized this. *See, e.g., infra* text accompanying note 613. The immediate impact of *Erie* in muddying the waters may be gleaned not only from contemporary commentary, *see, e.g., Tunks, supra* note 25, but also from the Senate Hearings held on the proposed Federal Rules of Civil Procedure. At the first session, held prior to the decision in *Erie* (rendered on April 25, 1938), the discussion of the Act's procedure/substance dichotomy was in terms of the permissible scope of delegated legislative authority. *See, e.g., Hearings on S.J. Res. 281 Before a Subcomm. of the Senate Comm. on the Judiciary*, 75th Cong., 3d Sess., pt. 1, at 9-10, 20 (April 18, 1938) [hereinafter cited as 1938 Senate Hearings]. The discussion at the House Hearings had been of the same tenor. *See, e.g., Hearings on Proposed Rules of Civil Procedure and on H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 14, 25, 74, 131 (March 1-4, 1938) [hereinafter cited as the 1938 House Hearings]. At the second session

It is difficult to find even a trace of concern that the uniform federal procedure bill might lead to an inappropriate displacement of state law in any of the reports and other material produced by its ABA sponsors during the long campaign. Indeed, Shelton suggested that the Conformity Act was "a sop thrown to state pride," the product of misguided social "politeness" any basis for which no longer obtained.<sup>436</sup> Of course, the form of the original uniform federal procedure bill,<sup>437</sup> the heavy reliance placed by Shelton on the New York model,<sup>438</sup> and the hope for a uniform national procedure<sup>439</sup> may have obscured the possibility of improper encroachment. Another explanation, however, applicable as well to Congress, seems more plausible.

Senator Walsh's early published objections to, and arguments against, the uniform federal procedure bill emphasized the convenience of lawyers.<sup>440</sup> Even the argument in his 1926 Texarkana

of the Senate Hearings, held after *Erie* was decided, the possibility that one or more of the proposed Rules might be invalid was explored both from the perspective of delegation, *see, e.g.*, 1938 *Senate Hearings, supra*, pt. 2, at 28-30 (May 19, 1938), and from the perspective thought to have been made relevant by *Erie*, *see id.* 39-40, 45. Indeed, the record of the Senate Hearings includes a memorandum on the implications of *Erie* for the proposed Rules co-authored by Gustavus Ohlinger, who had previously attacked the Advisory Committee's work on delegation grounds. Compare Ohlinger & Wolf, Memorandum in Connection with Senate Joint Resolution 281, Seventy-Fifth Congress, reprinted in 1938 *Senate Hearings, supra*, pt. 2, at 53 with Ohlinger, *supra* note 36.

In the years following *Erie*, although some commentators could not resist the Court's invitation in *Sibbach* to read the Rules of Decision Act, as interpreted by *Erie*'s progeny, into the Rules Enabling Act, even when they recognized that that might be contrary to Congress's original intent, *see, e.g.*, Note, *supra* note 69, at 1032-33, others realized that the Enabling Act had a separate function, including presumably in cases where federal law furnishes the rule of decision. However, they were rarely clear in articulating what that function was, or, alternatively, in moving beyond Supreme Court decisions that had failed to recognize it. *See, e.g.*, Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 364-65 (1950); Degnan, *supra* note 19, at 345-51; Degnan, *supra* note 22, at 283-87; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 HARV. L. REV. 601, 604-09, 629-35 (1964) [hereinafter cited as Kaplan, 1961-1963 *Amendments (I)*]; Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-63 (II)*, 77 HARV. L. REV. 801, 806-11, 834 (1964) [hereinafter cited as Kaplan, 1961-1963 *Amendments (II)*]; Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 369-70 (1967). But *see, e.g.*, Clinton, *supra* note 13, at 51-77; Landers, *supra* note 31, at 849-61; *cf.* Wright, *supra* note 20, at 568-74 (limitations on procedural reform).

<sup>436</sup> Shelton, *supra* note 146, at 127.

<sup>437</sup> *See supra* note 154; *see also supra* note 228.

<sup>438</sup> *See supra* text accompanying notes 174-86 & 203-04.

<sup>439</sup> *See supra* text accompanying notes 148-51 & 159.

<sup>440</sup> *See supra* text accompanying notes 211-14 & 221. It should be recalled that, according to the Court, the convenience of lawyers was the primary consideration behind the Conformity Act of 1872. *See* Nudd v. Burrows, 91 U.S. 426, 441 (1875); *supra* text accompanying notes 99-101.

speech, which was incorporated in the 1926 Senate Minority and 1928 Senate Reports,<sup>441</sup> was, in terms, designed to demonstrate the immensity, if not the impossibility, of the rulemaking task set for the Supreme Court.<sup>442</sup> The fact that, as a skillful opponent of the Cummins bill,<sup>443</sup> Walsh eventually fastened on controversial matters that, for some purposes, might be deemed "procedure" should not obscure what is also the fact, namely that *when Walsh finally did begin explicitly to articulate federalism objections to the Cummins bill, they embraced the entire enterprise and not some preserve established by the boundary between "procedure" and "substantive rights."*<sup>444</sup>

Whatever the thrust of Walsh's objections to the Cummins bill, properly conceived, it may be that those who disagreed with him on the Senate Judiciary Committee in 1926 and 1928 interpreted them to include the objection that the bill authorized rulemaking in discrete areas properly governed by state law.<sup>445</sup> The important point for present purposes, however, is that those who rebutted Walsh's objections did not thereby intend to suggest that the *purpose* of the bill's procedure/substance dichotomy was to safeguard state law. Rather, they sought to demonstrate that the *effect* of the limitations on court rulemaking—limitations that were formulated for another purpose<sup>446</sup>—was to do so, unless Congress chose to legislate specifically in the area.<sup>447</sup>

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<sup>441</sup> See *supra* text accompanying note 341.

<sup>442</sup> See *supra* text accompanying notes 318-19. But note Walsh's statement at the 1922 Senate Hearings. See *supra* text accompanying note 242.

<sup>443</sup> See *NLRB v. Fruit & Vegetable Packers*, 377 U.S. 58, 66 (1964), *quoted supra* note 420; see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956).

<sup>444</sup> See *supra* text accompanying notes 318-19 & 336.

<sup>445</sup> See *supra* text accompanying notes 311 & 350. The same may be true of the objections reported by Cummins at the 1924 Senate Hearing. See *supra* text accompanying notes 293-96. In that regard, it should be noted that some of the matters that prompted objections had been sources of friction and had prompted congressional action in the nineteenth century. See *supra* text accompanying notes 93-105.

<sup>446</sup> See *supra* text accompanying notes 415-23.

<sup>447</sup> In the Minority Views to the 1928 Senate Report, a reference was made to the treatment of state statutes of limitations under the Rules of Decision Act, in support of the argument that the matter was not subject to rules of court under the Cummins bill. See 1928 SENATE REPORT, *supra* note 340, pt. 2, at 17. However, there is no reason to believe that the reference was other than an isolated (and inappropriate) attempt to support a substantive characterization under the Act by reference to prior characterizations. Immediately thereafter, by referring to state models and by quoting from the 1926 Senate Report, the minority again demonstrated its awareness of the purpose of the procedure/substance dichotomy in the bill. See *id.*; see also *supra* note 433.

None of the pre-1934 legislative materials purported to speak to the question of the power of federal courts to make law in the context of adjudication. The

*C. Standards of Allocation*

Discerning the purpose served by the procedure/substance dichotomy in the Act's first two sentences is obviously of critical importance to the process of reinterpretation. Directing attention to allocation of powers rather than federalism is, however, only the beginning of an attempt to give meaning to the language in light of the pre-1934 history. Except with respect to specific matters it illuminates, the history is useful only to the extent it provides a basis for reasoning about general standards of allocation.

If the Act could be read to reflect, and only to reflect, constitutionally imposed limitations on court rulemaking, there would be a basis for the development of allocation standards outside the Act's history. But the evidence does not support that reading; the statutory limitations imposed by the Act stand on their own.

How, then, in light of the pre-1934 history, should the category of procedure subject to regulation by court rules be formulated? That category was thought to exclude substantive law, in the sense those words were used in *Sibbach*,<sup>448</sup> but it was thought to exclude more. The relevant substantive rights under the Act, however, are not, as Professor Ely has argued, those that reflect existing state substantive policy choices on the same subject covered by a Federal Rule. The purpose of the procedure/substance dichotomy is not to protect state or federal policy choices on such matters, although it may have that effect. Its purpose is, rather, to *allocate* policy choices—to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights. To the extent existing legal rights are relevant to an allocation decision under the Act, they are rights recognized by federal or state substantive law (in the *Sibbach* sense) and inter-

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assurances given in the 1926 Senate Report and in the 1928 Senate Minority Report related only to court rules promulgated under the Cummins bill. And indeed, it might have been difficult to give such assurances even as to local statutory law in 1926 or 1934. See, e.g., *Kirby v. Lake Shore & Mich. S.R.R. Co.*, 120 U.S. 130 (1887). But see *Guaranty Trust Co. v. York*, 326 U.S. 99, 100-11 (1945).

<sup>448</sup> Is the phrase "substantive rights" confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought . . .

. . . The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.



ests recognized by the Constitution. The pre-1934 history suggests an intent to exclude rulemaking by the Supreme Court, and to require that any prospective federal lawmaking be done by Congress, where the choice among legal prescriptions would have a predictable and identifiable effect on such rights. In addition, the history suggests a purpose to foreclose the creation in court rules of rights that would approximate the substantive law in their effect on person or property.

### 1. The Relationship Between the Act and Constitutional Limitations on Court Rulemaking

As a preliminary matter, it is necessary to identify the *source* of the limitations on rulemaking that those in Congress who gave informed consideration to the legislation that became the Rules Enabling Act sought to impose. For although the Court's acceptance of plenary legislative control of its supervisory rulemaking has rendered academic some interesting and difficult questions regarding the place of court rulemaking in our constitutional scheme,<sup>449</sup> there is at least one practical problem of interpretation demanding the inquiry: if Congress's primary purpose in prescribing limitations on the Court's rulemaking power under the Act was to ensure that the Court observed whatever might be the constitutional limitations on the delegation of legislative power or the constitutionally required separation of powers either as of 1934 (static linkage) or as of the time the Court promulgated Federal Rules (dynamic linkage),<sup>450</sup> any specific standards emerging from the pre-1934 history would be of little interest today. First, the legislators may have misperceived the relevant constitutional doctrine at the time. Second, the shape of that doctrine, and with it the Court's rulemaking power, may have evolved since 1934. A review of the history, however, suggests that the individuals concerned about allocation standards were not primarily animated by constitutional considerations and that they were in any event unwilling to remit the standards to changing constitutional interpretation. To the extent those individuals referred to

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<sup>449</sup> See *supra* note 19; see also J. WEINSTEIN, *supra* note 3, at 21-75.

<sup>450</sup> For a discussion of the constitutional sources of the non-delegation doctrine, distinguishing, for example, separation of powers, see S. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* ch. 2 (1975); see also Freedman, *Review: Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976). These constitutional questions are to be distinguished from constitutional limitations governing the exercise of federal power vis-à-vis the states. Compare Ely, *supra* note 3, at 703-06 with Mishkin, *supra* note 82.

constitutional limitations, it was to fortify support for statutory limitations independently deemed appropriate, which Congress had the power to impose in the Act.<sup>451</sup>

### a. *The Constitutional Context*

The Supreme Court has never satisfactorily explained—indeed it has hardly discussed—the place of court rulemaking in our constitutional framework. The early cases, starting with *Wayman v. Southard*,<sup>452</sup> in which the sources and limits of the rulemaking power were treated, set a pattern of ambiguity that has not been departed from.<sup>453</sup> Not even the power of federal courts to regulate procedure by court rules in the absence of legislative authorization, power assumed to exist in the 1926 Senate Report,<sup>454</sup> is made clear in those cases, and it has not been made clear since.<sup>455</sup>

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<sup>451</sup> Cases dealing with interpretive problems of this sort identified by the author have not proved very helpful. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 336-40 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring and dissenting); *Federal Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464 (1950); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Helvering v. Griffiths*, 318 U.S. 371 (1943); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941). It is clear, of course, that Congress's intent controls, to the extent it can be ascertained. Note, moreover, that these cases are relevant only if, contrary to the argument in the text, Congress imposed limitations on court rulemaking primarily because they were thought to be required by the Constitution. Finally, the cases point in opposite directions on whether, once linkage is found, it should be deemed static or dynamic. Compare, e.g., *Griffiths with South-Eastern Underwriters*.

<sup>452</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>453</sup> See *id.*; see also, e.g., *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629 (1924); *Beers v. Haughton*, 34 U.S. (9 Pet.) 328 (1835); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825). For a discussion of the problems posed for rulemaking by the Supreme Court by constitutional and prudential limitations on the exercise of judicial power enunciated in other contexts, see J. WEINSTEIN, *supra* note 3, at 44-55. "The rule-making power has, nevertheless, evolved through pragmatic choices and by largely ignoring the dilemmas posed by the theoretical underpinnings of our judicial system." *Id.* 21; see also 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.1 (2d ed. 1978).

<sup>454</sup> See 1926 SENATE REPORT, *supra* note 297, at 11. Elsewhere in the Report, the Committee indicated that "[t]here may be doubt" on the question. *Id.* 8; see also *id.* 2; cf. *id.* 7 (no inherent power "beyond the power of Congress to amend or repeal").

<sup>455</sup> But see 1 1915 NEW YORK REPORT, *supra* note 175, at 174-77. The authorities relied on there, cases cited *supra* notes 452-53, simply do not establish judicial power, absent legislative authorization, to regulate procedure by court rules, let alone supervisory court rules. The most they establish—all that was necessary—is that rulemaking is a function that, under the Constitution, federal courts may exercise under a delegation from the Congress that is itself constitutional. But see Note, *supra* note 22, at 1064 (failing to note that the passage quoted from *Wayman* was part of the argument of counsel, not of the opinion of the Court). Moreover, whatever the case for power to fashion local or supervisory rules in the absence of legislation, see *In re Hien*, 166 U.S. 432, 436-37 (1897) (dictum) (local rules); *Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) (dictum) (Equity Rules); cf. *Ex parte Peterson*, 253 U.S. 300, 312-14 (1920) (inherent power to appoint auditor),

In the absence of considered discussion by the Court, the theory seemingly espoused in *Wayman* and subsequent cases, that of delegated legislative power,<sup>456</sup> has not easily won acceptance in the literature. During the campaign for the uniform federal procedure bill and the national movement for court rulemaking, arguments were increasingly made that courts possessed the inherent power to regulate procedure by court rules and to do so even in the teeth of contrary legislative direction.<sup>457</sup> To be sure, such arguments often reflected the passion of the reformer more than the detachment of the scholar,<sup>458</sup> ignoring distinctions between local and supervisory rules of court and between rules of court promulgated in a legislative vacuum and rules of court contravening statutes;<sup>459</sup> but they were, and are, persistent.<sup>460</sup>

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it is difficult indeed to understand how either can be said to be a power "necessary to the exercise of all others," *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), so as to trump a contrary determination by Congress. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Frankfurter & Landis, supra* note 2, at 1020-23; *Levin & Amsterdam, supra* note 19, at 29-33; *Comment, supra* note 90, at 83. But see 34 HARV. L. REV. 321 (1921); *Note, supra* note 19.

It is unclear whether Professor Martin's argument that the federal courts are free to disregard some of the Federal Rules of Evidence is intended to insulate from congressional action not only common law rules of evidence, but local or supervisory court rules of evidence as well. See *Martin, supra* note 4, at 178. In any event, even if one confines the argument to common law rules, the author's own examples, see *id.* 195-200, suggest the inappropriateness of making categorical, *a priori* judgments of "indispensability." Finally, as to congressional power over evidence, compare *id.* 177 with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 31 (1976) and *Vance v. Terrazas*, 444 U.S. 252, 265-66 (1980).

<sup>456</sup> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." 23 U.S. (10 Wheat.) at 42-43; see *supra* note 19; *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965); *Sibbach v. Wilson*, 312 U.S. 1, 9-10 (1941); *Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS., Spring 1976, at 102 (1976).

In *Supreme Court v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980), the Court held that "in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity," *id.* 731, and hence that the doctrine of absolute legislative immunity foreclosed an award of attorney's fees in a § 1983 action that was premised on acts or omissions in that capacity. See *id.* 738; see also *W. BROWN, supra* note 14, at 40 n.89.

<sup>457</sup> See *supra* note 325 and accompanying text.

<sup>458</sup> See *Williams, supra* note 19, at 505-06.

<sup>459</sup> See *id.*; see also *Comment, supra* note 90, at 81. Senator Walsh distinguished between local and supervisory rules of court. See, e.g., 1926 SENATE REPORT, *supra* note 297, pt. 2, at 33 (Minority Views).

<sup>460</sup> See *supra* note 19. For an interesting account of the experience in Connecticut and a review of state rulemaking allocations in general, see *Kay, The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975).

b. *Constitutional Doctrine and the Campaign for the Uniform Federal Procedure Bill*

The sponsors of the ABA campaign were cautious about tying the argument for an "equable division" of power between the Supreme Court and Congress to a perceived constitutional imperative of judicial power.<sup>461</sup> *Wayman* and its progeny, and the long history of acquiescence by the Court in legislative control of rule-making, no doubt exercised moderating influences. In addition, it may have been thought the better part of wisdom to try to reach a constitutional accommodation with Senator Walsh, whose expressed doubts about the validity of supervisory rules of court even when authorized by Congress remained a threat to the entire enterprise throughout.<sup>462</sup>

Against this background, it is understandable that the congressional supporters of the uniform federal procedure bill embraced a theory of court rulemaking that would enable Congress to put an end to the experiment if it yielded untoward consequences.<sup>463</sup> The background also suggests, however, the difficulty of finding support for the limitations imposed on court rulemaking in the decisions of the Supreme Court.<sup>464</sup> The Clayton bill pre-

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<sup>461</sup> See, e.g., 1914 *House Hearings*, *supra* note 154, at 22-24; *id.* 36-37; *supra* text accompanying note 237 (excerpt from standard report of the ABA Committee on Uniform Judicial Procedure); 1924 *Senate Hearing*, *supra* note 269, at 68; see also Kay, *supra* note 460, at 28, 38-39; Levin & Amsterdam, *supra* note 19, at 3-4. At a later time, during the congressional consideration of the proposed Federal Rules of Civil Procedure, at least one representative of the Advisory Committee was less cautious. See, e.g., 1938 *House Hearings*, *supra* note 435, at 131 (statement of E.B. Tolman). But see 1938 *Senate Hearings*, *supra* note 435, at 10 (statement of W.D. Mitchell).

<sup>462</sup> See *supra* text accompanying notes 221-22, 302-03 & 341-42; *supra* note 459.

<sup>463</sup> But the bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. On the contrary, Congress may revise the rules made by the Supreme Court, or by legislation may modify or entirely withdraw the delegation of power to that body. In that sense the bill is experimental. It gives to the court the power to initiate a reformed Federal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.

1926 *SENATE REPORT*, *supra* note 297, at 7.

<sup>464</sup> Further evidence of the difficulty of deriving constitutional limitations on court rulemaking from the decided cases may be found in the work of two scholars who, almost alone, have questioned the basic premises of Supreme Court decisions interpreting the Act. See Clinton, *supra* note 13, at 51-77; Landers, *supra* note 31, at 855-61. Some of Professor Landers' conclusions are discussed *supra* note 60. His version of the "constitutional limitations on the delegation of rulemaking power," Landers, *supra* note 31, at 855, although interesting, finds little support in any cases of which the author is aware. Modern delegation cases do not, as Professor Clinton's article suggests, take one very far. See Clinton, *supra* note 13, at 64-77; see also I. K. DAVIS, *supra* note 453, ch. 3. But see *id.* § 3.3, at 155; Freedman, *supra* note

sented no serious problem in that regard,<sup>465</sup> because the matters as to which rulemaking power was conferred could easily be considered "details" to which the Court in *Wayman* had referred.<sup>466</sup> Moreover, *Wayman* had become, and remained for many years, a *locus classicus* of delegation doctrine,<sup>467</sup> and by the time the bill was introduced, that doctrine, itself imperfectly rationalized, was experiencing strain in other areas.<sup>468</sup> No notice was taken of the changes made in the Sutherland bill.<sup>469</sup> It was the Cummins bill that evoked objections to the extent of the rulemaking power conferred and that provided the occasion for constitutional linkage.<sup>470</sup>

### c. *The Cummins Bill*

Evidently, it was Senator Cummins' view, as the draftsman of the first section of the bill that became the Act, that the limita-

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450; Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, LAW & CONTEMP. PROBS., Summer 1976, at 46.

<sup>465</sup> It did, however, present a serious problem for those who, with Senator Walsh, believed that the regulation of judicial procedure was a legislative function that could not, under the Constitution, be delegated to the courts acting in a supervisory capacity. See *supra* text accompanying note 462; *supra* note 330.

<sup>466</sup> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.

23 U.S. (10 Wheat.) at 41; see *supra* text accompanying notes 169-70.

Marshall may have held the most permissive theory of delegation of any American jurist—but Marshall's permissive theory, even if it does exist, is well hidden by language which is clearly designed to communicate the theory that Congress may delegate power over details only. Whatever Marshall's hidden theory, the fact is that he has been received as having enunciated a restrictive theory, and it is patent on the surface of his remarks that he intended to be received as he has been received.

S. BARBER, *supra* note 450, at 20-21; see also *id.* 63-72. But see 1 1915 NEW YORK REPORT, *supra* note 175, at 423 (noting that *Wayman* seems to authorize court rule-making with respect to executions but resolving doubts by classifying as fundamental and placing in separate statutes the "cases . . . in which an execution may issue against the person and property").

<sup>467</sup> See, e.g., *In re Kollock*, 165 U.S. 526, 536-37 (1897); *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 191-93 (1910); *United States v. Grimaud*, 220 U.S. 506, 516-21 (1911); *Curran v. Wallace*, 306 U.S. 1, 15-18 (1939); see also J. WEINSTEIN, *supra* note 3, at 92-96; 1 K. DAVIS, *supra* note 453, § 3.4, at 159.

<sup>468</sup> See, e.g., Bondy, *The Separation of Governmental Powers*, in 5 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW No. 2, at 162-71 (1896); Garvey, *Judicial Consideration of the Delegation of Legislative Power to Regulatory Agencies in the Progressive Era*, 54 IND. L.J. 45 (1978); Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 561-69 (1947); Wickersham, *Delegation of Power to Legislate*, 11 VA. L. REV. 183, 185 (1925); see also *supra* note 165 and accompanying text.

<sup>469</sup> See *supra* text accompanying note 231.

<sup>470</sup> See *supra* text accompanying notes 278 & 303.

tions contained in its first sentence, reinforced in the second, would at least safeguard limitations imposed by the Constitution on the Court's rulemaking power.<sup>471</sup> Moreover, when the occasion arose in the 1926 Senate Report to define those restrictions, the Committee at one point indicated that the ambit of the rulemaking power conferred was coextensive with the power the Court would possess in the absence of enabling legislation.<sup>472</sup> Thereafter, having quoted from *Wayman*, it found "inconceivable" the notion that any court would consider the matters raised by Senator Walsh as "merely filling 'up the details,' even though they relate to remedial rights."<sup>473</sup>

Nonetheless, it was not Cummins' or the Committee's primary purpose in formulating the limitations imposed by the Cummins bill to tie them to the Constitution, either as it was interpreted in 1926 or as it might be interpreted in the future. As to static linkage, the implications of the relevant constitutional doctrine were far from clear in 1926. Even at that time, it would have been difficult, if not impossible, to justify some of the Committee's classifications as constitutionally required.<sup>474</sup> Moreover, the notion that the rulemaking authority conferred by the uniform federal procedure bill did not extend to a class of procedure including "fundamental" matters had been advanced consistently throughout the campaign by the ABA. It was accepted, without reference to constitutional doctrine, at key points in the pre-1934 legislative history of the Act, including in the 1926 Senate Report.<sup>475</sup> As to dynamic linkage, the 1926 Senate Report should not be read to permit the revision of limitations by the very institution whose power Congress sought to confine.

The 1912 and 1915 New York Reports classified as "fundamental" most of the matters with which the 1926 Senate Report was concerned.<sup>476</sup> The 1926 Senate Report relied on the 1915

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<sup>471</sup> See *supra* text accompanying note 260.

<sup>472</sup> See 1926 SENATE REPORT, *supra* note 297, at 11, quoted *supra* text accompanying note 316.

<sup>473</sup> *Id.*

<sup>474</sup> To the extent that the 1926 Senate Report is evidence of an intent to proscribe rulemaking not only with respect to the core of the matters characterized there as substantive, but with respect to the matters as a whole, see *infra* text accompanying notes 519-23, the notion that constitutional linkage was intended becomes implausible. See *infra* text accompanying note 521. The Committee's categorical classification of all rules of admissibility of evidence is also difficult to support. See *infra* text accompanying notes 516-18.

<sup>475</sup> See *supra* text accompanying notes 193, 237 & 317; 1926 SENATE REPORT, *supra* note 297, at 12.

<sup>476</sup> See *supra* text accompanying notes 189-202 & 313-14.

New York Report for the classifications. It did not borrow, however, that part of the New York Board's analysis that might have been thought to give only statutory dignity to limitations against court rulemaking.<sup>477</sup> The scheme envisaged by the New York Board involved prior legislative classification of certain matters as substantive and their treatment in statutes outside the proposed practice act. With the Cummins Bill, Congress, on the other hand, was forced to rely on the Supreme Court:

Where a doubt exists as to the power of a court to make a rule the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.<sup>478</sup>

The expansive view of court rulemaking power in the 1915 New York Report<sup>479</sup> presupposed a legislature that would itself carve out areas preserved from the exercise of such power and that would be actively engaged in the regulation of procedure thereafter through a practice act.<sup>480</sup> A legislature like Congress,

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<sup>477</sup> The 1926 Senate Report drew its allusions to constitutional theory in support of the limitations imposed by the Cummins bill from the same source as it drew support for the existence of those limitations, the 1915 New York Report. The paragraphs in the 1926 Senate Report making the constitutional links follow immediately paragraphs in which the 1915 New York Report was cited and extolled as "probably the most scientific recent effort at simplification of a highly technical and complicated system of procedure having in view the segregation in a practice act and rules of court those matters [*sic*] which might properly be regarded as procedural." 1926 SENATE REPORT, *supra* note 297, at 11, *quoted supra* text accompanying note 316. More telling, the 1915 New York Report had opined that the inherent rulemaking power of the courts under the New York Constitution, power thought to exist only in the absence of contrary legislation, was coextensive with the rulemaking power that constitutionally might be delegated by the legislature to the courts. 1 1915 NEW YORK REPORT, *supra* note 175, at 174-77, *quoted in part supra* text accompanying note 202. The cited authority for that proposition, *Wayman* and its progeny, provides only equivocal support. See *supra* note 455. The 1926 Senate Report recited the same proposition, confining its discussion of authority to *Wayman*. See 1926 SENATE REPORT, *supra* note 297, at 11. There is, however, a difference between the analysis in the two reports, which may explain why the 1926 Senate Report did not enlarge the scope of its explicit reliance on the 1915 New York Report. The 1915 New York Report defined the constitutional power of courts to make rules expansively and explained the placement of "so many provisions formerly in the code . . . in substantive statutes" as flowing from a decision to resolve against the courts "every serious question of power." 1 1915 NEW YORK REPORT, *supra* note 175, at 177, *quoted supra* text accompanying note 202. The 1926 Senate Report admitted no question in allocating to Congress specific matters which the New York Board had placed in separate statutes. See 1926 SENATE REPORT, *supra* note 297, at 9, 11.

<sup>478</sup> 1926 SENATE REPORT, *supra* note 297, at 11.

<sup>479</sup> See *supra* note 477.

<sup>480</sup> See *supra* text accompanying notes 189-202.

for which neither activity seems a realistic, or perhaps a wise, activity,<sup>481</sup> may take comfort, at least in an uncertain constitutional climate, in suggestions of constitutional limitations as support for statutory limitations independently deemed appropriate. The Senate Committee's allusions to constitutional doctrine provided rhetorical support for those limitations. The allusions should not obscure the Committee's view, with respect to the matters discussed in the 1926 Report, that "any court would be astute to avoid an interpretation which would attribute to the words 'practice and procedure' an intention on the part of Congress to delegate a power to deal with such substantive rights and remedies."<sup>482</sup> If one accepts the relevance of the pre-1934 history, that view should control the interpretation of the Act, whether or not it was constitutionally required in 1926 or is so required today.

## 2. Procedure or Substantive Rights

### a. General Guidance

The 1926 Senate Report identifies the matters raised by Senator Walsh as among those which, although involving only remedies, are not "mere procedure, such as a court has power to prescribe."<sup>483</sup> In stating the reasons for such a characterization, the Report is not always clear. At times it refers to the matters excluded from the rulemaking power as "substantial,"<sup>484</sup> an adjective that does not advance the inquiry. On the other hand, the 1926 Senate Report does at least adumbrate standards for a classification scheme under the Act that augur more than jurisprudence by label. Among those standards is the notion that the rulemaking power does not extend to "matters involving substantive legal and remedial rights affected by the considerations of public policy."<sup>485</sup> Limitation or abatement of actions is included in this category because the decision when to bar or abate a claim limits whatever rights have been conferred on the claimant by the substantive law.<sup>486</sup> Limitations and abatement of actions, and provisional remedies, such as arrest and attachment, are included because, although remedial, in the words of the 1915 New York

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<sup>481</sup> See *supra* text accompanying note 232; *supra* note 326.

<sup>482</sup> 1926 SENATE REPORT, *supra* note 297, at 11.

<sup>483</sup> 1926 SENATE REPORT, *supra* note 297, at 9; see also *supra* note 297.

<sup>484</sup> 1926 SENATE REPORT, *supra* note 297, at 9; see also 1 1915 NEW YORK REPORT, *supra* note 175, at 439.

<sup>485</sup> 1926 SENATE REPORT, *supra* note 297, at 9.

<sup>486</sup> See *id.* 10-11.



Report, quoted in the 1926 Senate Report, "the matter is all of a substantive character and defines or limits certain civil rights . . . using that term in its broad sense."<sup>487</sup> The selection and qualification of jurors is included "because the subject treated is a fundamental right controlled by the Constitution."<sup>488</sup>

*b. The Substantive Rights That Are Relevant under the Act*

Even recalling that the second sentence of the Act was inserted for emphasis and was not thought to serve any independent function,<sup>489</sup> its language suggests a concern for substantive rights already recognized by law.<sup>490</sup> That line of reasoning was seized upon by the Court in *Sibbach* and prompted the question, "Recognized where and by whom?"<sup>491</sup> Recently, Professor Ely has invigorated the second sentence so as more effectively to protect substantive state policy reflected in state law in an area covered by a Federal Rule.<sup>492</sup> Leaving aside that these interpretations confuse purpose with effects<sup>493</sup> and thereby neglect a whole category of cases within the Act's grant of authority, attention to the relationship of Federal Rules to legally recognized rights, as con-

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<sup>487</sup> *Id.* 10 (quoting 3 1915 NEW YORK REPORT, *supra* note 175, at 477). The Committee also quoted passages noting that orders of arrest were governed by separate statutes and stating with respect to the grounds for attachment: "They embody substantive law of the same character as a provision prescribing under what circumstances an action may be brought . . . . [T]hey relate to important matters of substantive right that should be regulated by the legislature and not by the courts." *Id.* 11 (quoting 3 1915 NEW YORK REPORT, *supra* note 175, at 483). The Committee failed to point out, however, that the New York Board's characterization was limited to regulations respecting grounds for attachment. The Committee adopted it for "provisions governing attachments" generally. 1926 SENATE REPORT, *supra* note 297, at 11. The change may not have been inadvertent. See *infra* text accompanying notes 519-23.

<sup>488</sup> 1926 SENATE REPORT, *supra* note 297, at 11 (quoting 3 1915 NEW YORK REPORT, *supra* note 175, at 498). Here again, the Committee took a narrow characterization and applied it more broadly. The language quoted by the Committee was intended to apply to the right to jury trial. Although the 1915 New York Report assigned regulations regarding the selection of jurors to the legislature, it placed them in the Judiciary Law precisely because they were deemed "quite different in character from the provisions defining the right to a jury trial." 3 1915 NEW YORK REPORT, *supra* note 175, at 498; see *id.* 317-22. The Board had also proposed a few court rules regarding jury trial. See 1 *id.* 109.

<sup>489</sup> See *supra* text accompanying notes 424-29.

<sup>490</sup> But the impulse to impute to the Act's second sentence only a concern for existing substantive rights should be resisted even on linguistic grounds. Substantive rights are "enlarged" when they are created for the first time in rules of court.

<sup>491</sup> 312 U.S. at 13.

<sup>492</sup> See Ely, *supra* note 3, at 718-40; see also Chayes, *supra* note 82; Mishkin, *supra* note 82; cf. Wellborn, *supra* note 82 (adapting Ely's analysis to the Federal Rules of Evidence).

<sup>493</sup> See *supra* text accompanying notes 415-16.

tained in existing rules of law, may, unless circumscribed, distort the basic purpose of the procedure/substance dichotomy as revealed by the pre-1934 history.

The goal of the characterization exercise required by the Act is to determine the locus of decision-making concerning the need for and content of federally enforceable rights with respect to a particular matter, the Supreme Court making law through rules of court or Congress. All lawmaking with respect to the conduct of litigation in federal courts presumably involves the consideration of governmental policies and individual interests that are procedural in the sense that they relate to "the speedier and more intelligent disposition of the issues" in litigation.<sup>494</sup> In many situations any substantive policies and interests vying in competition in the lawmaking calculus<sup>495</sup> can be tied to existing rights only by reference to, and by begging the question posed in, the most general sources of law, such as the Constitution. Moreover, in a federal system substantive policies often cannot be tied to existing rights at all if attention is paid exclusively to choices already made about the matter in question in federal law or in the law of individual states.<sup>496</sup> Unless it was Congress's intention to leave the protection of constitutionally recognized interests to the Constitution itself, as interpreted by the courts in an adjudicatory context, and to remit decisions regarding the validity of the Federal Rules to the vagaries of competing federal and state law choices, the concept of substantive rights relevant for Enabling Act purposes must be different from that suggested either in *Sibbach* or in recent commentary.

With respect to some of the matters discussed and classified in the 1926 Senate Report, the concern appears to have been the potential effect on rights conferred by, including interests recognized in, an independent legal source, whether federal or state

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<sup>494</sup> 1926 SENATE REPORT, *supra* note 297, at 2.

<sup>495</sup> Professor Ely defines a "substantive rule—or more particularly a substantive right, which is what the Act refers to— . . . as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process." Ely, *supra* note 3, at 725 (footnote omitted). He would require that a Federal Rule yield to state law in the area covered by the Rule when the conflicting state law prescription is found to reflect any such purpose, and thus to confer a substantive right, even if it also reflects "procedural" purposes. *See id.* 726-27.

<sup>496</sup> According to Professor Ely's interpretation of the Act, a Federal Rule would not yield to conflicting state law if, upon analysis, the latter were found to reflect solely "procedural" policies or purposes. *See id.* 727-38. Thus, his interpretive construct protects only existing policy choices in the area covered by a Federal Rule, only those choices in which "substantive" policies have survived and are reflected, and only state policy choices.

substantive law or the Constitution.<sup>497</sup> In discussing and classifying other matters, the Senate Committee appears to have been concerned about the creation of rights with respect to person or property that were deemed to be indistinguishable for rulemaking purposes from the creation of substantive law.<sup>498</sup> The characterization of a court rule as procedural or substantive was not to be made by reference to a right conferred, reflecting a policy choice already made, by existing federal or state law in the area covered by the rule. The Committee recognized that the matters in question involved "the policy of the law which varies in the different States."<sup>499</sup> Nor was it decisive that court rules regulating them could be classified as procedural in the sense that some of the policies vying for recognition in the lawmaking process concerned the conduct of litigation. As might be expected in a statute designed to allocate lawmaking power, rather than to protect policy choices already made in the area in question, the key was thought to be whether the federal lawmaking decision would either affect "rights" already recognized by the "substantive law,"<sup>500</sup> or create

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<sup>497</sup> See *supra* text accompanying notes 486 & 488 (limitations and abatement; selection and qualification of jurors). The Committee noted: "Some of our most valued civil liberties have been obtained through the creation by legislative edict of mere remedial measures. Notable examples are the writ of habeas corpus, which enabled a citizen to enforce a substantive right which had existed for centuries." 1926 SENATE REPORT, *supra* note 297, at 12.

As used hereafter, the word "rights" in quotation marks includes both rights recognized by the substantive law and interests recognized by the Constitution, and the words "substantive law" in quotation marks include both the substantive law and the Constitution.

Note that, if one disregards *Sibbach's* preoccupation with state law, that case has in it the seeds of a standard of this sort with respect to rights claimed under the substantive law. See *supra* notes 59 & 71.

<sup>498</sup> See *supra* text accompanying note 487 (arrest and attachment); see also 1 1915 NEW YORK REPORT, *supra* note 175, at 424 ("These provisions [regarding arrest] however have been preserved in the substantive statutes because it has not been deemed the function of this board to revise the substantive law of the state.").

The same analysis applies to the subject of execution, an objection regarding which had been noted by Cummins at the 1924 Senate Hearing, see *supra* text accompanying note 273, and which was thought by the New York Board to present "sharply the limit of the power of the courts to make rules." 1 1915 NEW YORK REPORT, *supra* note 175, at 423. The Board classified as fundamental and placed in the substantive statutes the "cases . . . in which an execution may issue against the person and property." *Id.*; see *supra* text accompanying note 197; *supra* note 466. It noted, however, that "the rules will also be found to cover in general language nearly the entire field." 1 1915 NEW YORK REPORT, *supra* note 175, at 423; see *id.* 152-60. Senator Cummins' remarks did not suggest similar precision of classification. See 1924 Senate Hearing, *supra* note 269, at 61; *infra* note 643.

<sup>499</sup> 1926 SENATE REPORT, *supra* note 297, at 9, quoted *supra* text accompanying note 311.

<sup>500</sup> The nature of the effect proscribed remains to be explored. See *infra* text accompanying notes 511-24.

rights indistinguishable from those recognized by the substantive law in their effect on person or property. If so, the choice between or among the competing policies was for Congress, or in the absence of congressional action, for the states.<sup>501</sup>

*c. Problems Arising from Use of the State Models: The Protection of State Law*

Reliance on state models was not without disadvantages for the 1926 Senate Judiciary Committee, as for the ABA Committee on Uniform Judicial Procedure and the 1914 House Judiciary Committee.<sup>502</sup> In limiting its reliance on the 1915 New York Report, the Senate Committee seemingly acknowledged differences flowing from the extent of legislative involvement at the outset of, and during, the rulemaking enterprise.<sup>503</sup> Nevertheless, the sources of restrictions on the rulemaking power aside, the 1926 Senate Report reflects, as much of the contemporary literature reflects, a monolithic view of allocation standards that poses substantial theoretical and practical questions.<sup>504</sup>

At the level of theory, it might be asked whether an allocation scheme appropriate for a state will not inevitably submerge special problems of allocation unique to a federal system. In a federal system, the scheme must accommodate not only situations in which, as in a state system, the choice is exclusively among its own lawmaking sources, but also situations in which the choice is between federal and state lawmaking sources. The pre-1934 history reveals no special interest in problems of federalism among the supporters of the uniform federal procedure bill.<sup>505</sup> In response to objections, however, they provided assurances that, under the Cummins bill, court rules would not be framed "which would deal with substantial rights and remedies in a manner contrary to the public policy of the States embodied in local statutory law."<sup>506</sup> The standards of allocation suggested by the pre-1934 history reserve to Congress, as opposed to the Supreme Court exercising its rulemaking function, the responsibility for deciding whether to

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<sup>501</sup> There was, of course, a possibility that the matter might be governed by federal decisional law, as to which the 1926 Senate Report is silent. See *supra* note 447.

<sup>502</sup> See *supra* text accompanying notes 185-86.

<sup>503</sup> See *supra* text accompanying notes 477-82.

<sup>504</sup> See *supra* text accompanying notes 331-36.

<sup>505</sup> See *supra* text accompanying notes 430-47.

<sup>506</sup> 1926 SENATE REPORT, *supra* note 297, at 9; see *supra* text accompanying note 305.

exercise federal power and what choices should be made when "rights" recognized by the "substantive law" may be affected, or rights akin to those recognized by the substantive law are at issue. Thus, those standards have the potential to fulfill the promise in the 1926 Senate Report.<sup>507</sup> Whether the potential can be realized depends upon the manner in which the standards are implemented.

At the practical level, as well, reliance on a state model, particularly one which includes prior legislative classification, presents difficulties. It is not surprising that, having recommended that all matters raising a serious question of rulemaking power be classified as substantive by the legislature, the New York Board of Statutory Consolidation was content to dismiss questions "of power to enact a specific rule," at least where they were "a mere matter of opinion," lest "fine theories or preconceived notions . . . stand in the way of the advancement of a great public reform."<sup>508</sup> Even absent prior classification by the legislature, the task of identifying matters that may affect "rights" under the "substantive law" or that involve the creation of rights equivalent to those recognized by the substantive law would be manageable in a unitary system of government. Impact on the "substantive law" alone is of concern under the Act, interpreted in the light of the pre-1934 history. The policies reflected in existing rules of law are irrelevant to the allocation decision, and it should be possible to identify interests protected by the United States Constitution.<sup>509</sup> In such cases, it is the prediction of impact that may be difficult. The areas in which the Act has reference to rights independent of existing legal sources, and forbids their creation or definition, are considerably more difficult to identify absent a shared conception of the distinctive features of the substantive law.

But the federal system is not unitary. Those charged with the duty of identifying and avoiding rulemaking with respect to

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<sup>507</sup> See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976). Compare Degnan, *supra* note 22, at 288-89 with Mishkin, *supra* note 82. But see Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 181-88 (1977). On the question of choosing state law as a federal common law rule where Congress has not so directed, see Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

<sup>508</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 177, quoted *supra* text accompanying note 202.

<sup>509</sup> "Where the delegated decision affects the constitutional rights of individuals, there is at least a ready benchmark for assessing the 'importance' of the powers delegated." Gewirtz, *supra* note 464, at 62; see *id.* 76-77.

such matters at the federal level might seem to have a far more difficult task because of the multiplicity of sources of law applicable in the federal courts. The policies animating existing legal rules governing a matter are irrelevant, however, and the alternatives of becoming conversant with the jurisprudence of all of the states or hazarding the validity of Federal Rules on the jurisprudence of individual states—the alternatives presented by Professor Ely's proposal to read the Act's second sentence to protect "substantive" state policy<sup>510</sup>—are avoided. In addition, the rulemakers' task of identifying interests protected by the Constitution is not affected by the change of perspective. On this analysis, the main obstacle to the fulfillment of the promise regarding the protection of state law in the 1926 Senate Report is, again, the prediction of impact. Finally, it does not require a catalogue of all existing rules of substantive law to recognize when rules designed to regulate the conduct of a lawsuit will share the distinctive features of the former. Again, however, the missing element is a shared conception of what those features are.

#### d. *Refining the Standards of Allocation*

Without refinement, the broad standards of allocation derived from the 1926 Senate Report would cripple the rulemaking enterprise contemplated by the Act. There is evidence, however, of such refinement in the 1926 Report, although there is also evidence of confusion and lack of consistency.

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<sup>510</sup> According to Professor Ely's test for validity of a Federal Rule under the Enabling Act, the Rule must yield even to nonobvious state substantive policy choices but would not yield to a state law identical in terms if the latter were found not to have been animated by a policy extrinsic to the litigation process. See *supra* notes 495-96. Apart from the problem of prior identification, one who is conversant with modern American choice of law decisions might well pause before extending the often rootless exercise in "[i]ntramural speculation" that masquerades as the determination of the policies reflected in rules of state law. *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411, 301 N.Y.S.2d 519, 543 (1969) (Breitel, J., dissenting). Indeed, the exchange between Professors Ely and Chayes, reaching different conclusions while using the same technique, is reason enough to be dubious about the usefulness of that technique in the real world. Compare Ely, *supra* note 3, and Ely, *supra* note 82 with Chayes, *supra* note 82. Professor Ely himself has recently exposed some of the weaknesses of policy identification in the choice of law context. See Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 192-99 (1981). Legislative history aside, one should certainly hesitate to attribute to Congress, in 1934 or today, a purpose to inflict such an exercise on the bar or on the federal courts. See *Boggs v. Blue Diamond Coal Co.*, 497 F. Supp. 1105, 1119-20 (E.D. Ky. 1980); cf. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) (arguing that governmental interest analysis is not a method that discovers and then implements actual legislative intent and that, from both normative and empirical perspectives, it is not a reliable guide to constructive legislative intent).

Most of the matters discussed and classified as substantive in the 1926 Senate Report involve, at their core, either potential effects on "rights" recognized by the "substantive law" that are *predictable and identifiable*, or the creation of remedial rights that *predictably and identifiably* affect personal liberty or the use and enjoyment of property. Probably for that reason, the Committee deemed it "inconceivable" that any court would consider rules dealing with such matters as within its authority.<sup>511</sup>

One can predict with certainty that the choice of one rule regarding the cases in which an order of attachment may issue will, when compared to another rule defining such cases differently, affect, in a manner that is identifiable, the use or enjoyment of property in much the same way as rules of substantive law. A similar analysis applies to the other provisional and final remedies discussed in the 1926 Senate Report.<sup>512</sup> The remedies are coercive. They directly impinge upon the ability to use property or to enjoy personal freedom. Thus, they share a characteristic with rules of substantive law: both affect out-of-court conduct, or as it is sometimes called, albeit for a different purpose, "private primary activity."<sup>513</sup>

In connection with the Act's concern for "rights" already recognized by the "substantive law," less certainty attends a prediction of impact as to a choice between one limitations or abatement period over another. The uncertainty arises from the differences in ability of those whose substantive law rights are at stake to protect themselves, but experience with a variety of time periods tells us that some impact is assured, and it is identifiable.

Clearly preclusive doctrines like a statute of limitations, laches, or *res judicata* dramatically affect the ability of litigants to enforce their substantive rights and, therefore, determine in a practical sense whether those rights exist at all, at least when viewed from the point in time at which they are asserted.<sup>514</sup>

Still less clearly predictable and identifiable is the effect of alternative standards of qualification and selection of jurors on

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<sup>511</sup> 1926 SENATE REPORT, *supra* note 297, at 11, *quoted supra* text accompanying note 316.

<sup>512</sup> See *supra* note 498.

<sup>513</sup> *Hanna v. Plumer*, 380 U.S. 460, 477 (1965) (Harlan, J., concurring); see *id.* 475 & n.2 (citing H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 678 (1953)).

<sup>514</sup> *Clinton*, *supra* note 13, at 59.

constitutionally recognized interests. Experience may not be an adequate guide here. The Senate Committee may have intended to suggest that when the interest in question finds its source in the Constitution, the confidence with which a prediction and identification of impact must be made before choice is allocated to Congress under the Act should be reduced. Such a position would be justified in light of the generality of most constitutional provisions and the possibility, therefore, that court rules will, in the absence of authoritative judicial decisions, effectively define a constitutional right.<sup>515</sup>

Rules of evidence are perhaps the most difficult of the matters classified as substantive in the 1926 Senate Report to rationalize in terms of the concerns that, in general, seem to inform its characterizations.<sup>516</sup> It appears that only rules regarding admissibility,

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<sup>515</sup> Indeed, that seems to have been the concern of the New York Board with respect to the right to jury trial. *See supra* note 488. It does not require much faith in the reality of differences between court rulemaking and adjudication to believe that rulemaking involving constitutionally recognized interests poses significant risks to those interests. *See Clinton, supra* note 13, at 45; Degnan, *supra* note 19, at 348-49. *But see Colgrove v. Battin*, 413 U.S. 149 (1973) (local Rule).

In cases of this type, the allocation standard suggested by the pre-1934 history would ensure that the Supreme Court, as the ultimate arbiter of the Constitution, remained free of the predisposing effect of prior promulgation of a court rule. As noted in *W. BROWN, supra* note 14, at 105: "The most serious concerns are those relating to the allegedly cursory nature of the Court's review and its alleged inability to consider promulgated rules impartially in litigated cases, with the result that constitutional questions are sometimes determined in the abstract by advisory committees, without either judicial or legislative safeguards." A somewhat different aspect of this problem, raised by *Colgrove v. Battin*, is discussed in Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 *LOX. L.A.L. REV.* 213, 237-39 & n.118 (1981).

Moreover, such a standard could serve federalism interests in two ways. First, unless Congress acted in the area or the federal courts fashioned a rule in the context of adjudication that could displace state law, *see supra* note 447, the latter would furnish the governing rule. This is no different in terms of federalism concerns than the effects of the allocation standards generally. *See supra* text accompanying notes 495-96 & 507. Second, by ensuring that the Supreme Court interpreted the Constitution free of the predisposing effect of court rules, the standard might in some cases preserve the ability of the states to experiment. This is different, reflecting the fact that, in an age of constitutional incorporation, many interpretations of the Constitution will foreclose state experimentation, whereas Federal Rules not embodying such interpretations are not binding on the states. In other cases, however, state experimentation might better be served by the existence of federal court rules affecting constitutionally recognized interests. *See Colgrove v. Battin*.

Senator Cummins' questions regarding "notice" to nonresident defendants at the 1924 Senate Hearing seem to have derived from a concern that federal court rules not displace state law that he apparently believed was constitutional. *See 1924 Senate Hearing, supra* note 269, at 61, *quoted infra* text accompanying note 641.

<sup>516</sup> Although not one of the matters raised by Senator Walsh in his minority views, rules of evidence were among the matters excluded from the rulemaking power in the 1926 Senate Report, both by explicit reference to state models, *see 1926 SENATE REPORT, supra* note 297, at 10, and by an unattributed quotation from



as opposed to those governing the taking and obtaining of evidence, were excluded from the grant of rulemaking authority.<sup>517</sup> Nevertheless, the prediction of an effect on rights recognized by the substantive law hardly can be made with confidence categorically even concerning choices in that subset of the law of evidence, and the effect need not be identifiable.<sup>518</sup>

On the other hand, it is not clear that the Senate Committee intended to confine rulemaking limitations to what has been called the core of matters classified as substantive. Most of those matters involve broad legal categories.<sup>519</sup> It is possible to imagine Federal Rules treating aspects of most if not all of the matters classified as substantive by the Senate Committee that would have no more predictable and identifiable effect on "rights" recognized by the "substantive law" and would no more predictably and identifiably affect private primary activity than the Federal Rules the Committee and Congress clearly did intend to authorize.<sup>520</sup> In fact, the New York Board had proposed rules of court covering par-

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the standard report of the ABA Committee on Uniform Judicial Procedure, *see id.* 12. *See also supra* note 317.

<sup>517</sup> Such was the New York model. Compare 1 1915 NEW YORK REPORT, *supra* note 175, at 98-107 (court rules covering discovery and similar matters) with 3 *id.* 219-57 (evidence law). The Clayton bill authorized the Supreme Court to prescribe "the mode . . . of taking and obtaining evidence." *See supra* note 154. The 1914 House Report, however, specifically noted that Congress would retain control over the "production of evidence," 1914 HOUSE REPORT, *supra* note 166, at 14, by which it must have intended rules of admissibility. These matters are discussed further *infra* text accompanying notes 547-66.

<sup>518</sup> Cf. Degnan, *supra* note 22, at 289-91 (discussing the outcome-determination test of *Erie's* progeny). It is possible that the failure of the Committee to be more discriminating with respect to rules of evidence reflects mere slavish borrowing. On the other hand, the Committee was selective in its use of the 1915 New York Report, altering the analysis and characterizations it found there to suit its purposes. *See supra* text accompanying notes 477-82; *supra* notes 487-88. Thus, the Committee may have followed the New York Board because, in this area, the latter had itself taken a categorical approach. In addition, evidence having been one of the few matters characterized in the 1912 New York Report, its treatment there had been picked up early by the ABA Committee on Uniform Judicial Procedure, with the result that "rules of evidence" was the only matter identified as within the "first class" of procedure identified in the Committee's standard report as lying "exclusively with the legislative department." *See supra* text accompanying note 237 (excerpt from standard report of the ABA Committee on Uniform Judicial Procedure).

<sup>519</sup> It is important to keep in mind that the Committee's discussion was in response to the objections made by Senator Walsh and was essentially limited to the matters he had raised. *But see supra* note 516. One must be careful, therefore, in drawing general conclusions from the Committee's treatment of those matters.

<sup>520</sup> For instance, the objection to court rules defining the cases in which provisional and final remedies may be applied would not seem to extend to rules specifying who shall issue or serve the process. *See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia* 141 (1936) (draft rule 78) [hereinafter cited as *Preliminary Draft*]; *see also infra* text accompanying note 571.

ticular aspects of a number of the categories,<sup>521</sup> and court rules as to the "how" rather than the "what" had always been contemplated by the Committee on Uniform Judicial Procedure and were contemplated in the 1926 Senate Report.<sup>522</sup> In failing consistently to mark the distinction at the 1924 Senate Hearing and in the 1926 Senate Report, Cummins and the Committee may have sought to insure a margin of safety, at least in areas where objections had been made, even greater than that which had provided comfort to the New York Board of Statutory Consolidation.<sup>523</sup> More probably, the difficulty and reactive nature of their enterprise prevented a more consistent and comprehensive analysis.<sup>524</sup>

## V. EXPERIENCE UNDER THE ACT

One of the complaints made about federal court rulemaking is that the rulemakers have, in recent years, failed to pay adequate attention to the Rules Enabling Act's limitations.<sup>525</sup> In the early years, it has been asserted,<sup>526</sup> the Advisory Committee and the Supreme Court scrupulously avoided questionable exercises of power. In order to test the assertion and to understand the implications of the Act's pre-1934 history, it is instructive to examine the interpretations of the Act's procedure/substance dichotomy emerging from a lawmaking process that concluded before *Erie* was decided and to compare them with the Supreme Court decisions considering the validity or reach of Federal Rules, all of which were rendered after *Erie*.<sup>527</sup>

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<sup>521</sup> See *supra* notes 487-88 & 498.

<sup>522</sup> See *supra* text accompanying notes 237 (excerpt from standard report of the ABA Committee on Uniform Judicial Procedures) & 317. This was, of course, merely another way of stating the procedure/substance dichotomy.

<sup>523</sup> See *supra* text accompanying notes 480-81; *supra* notes 487-88 & 498. It is also possible that the Committee's references to the experience in England and in those states which had authorized court rulemaking, see 1926 SENATE REPORT, *supra* note 297, at 9-10, quoted *supra* text accompanying note 311, were intended not only to support its characterizations but also to suggest the relevance of such experience in the process of characterization itself. Both views are consistent with the assumption by the Committee of universally espoused standards of allocation. See *supra* text accompanying note 504. Only the latter, however, has continuing interpretive significance, and it is quite limited since the Committee relied on unanimity, which was less likely to obtain as rulemaking caught on in the states.

<sup>524</sup> See *supra* note 519.

<sup>525</sup> For a summary of criticisms of this variety, see W. BROWN, *supra* note 14, at 86-93.

<sup>526</sup> See, e.g., 1938 Senate Hearings, *supra* note 435, at 9 (statement of W.D. Mitchell); 1 J. MOORE & J. FRIEDMAN, MOORE'S FEDERAL PRACTICE § 1.03 (1938) [hereinafter cited as MOORE & FRIEDMAN]; Clark, *supra* note 252, at 251-53.

<sup>527</sup> The adoption of these criteria for discussion has seemed sensible in light of the dual aims of this section and of considerations of space. It has the effect, how-

This inquiry reveals that the Advisory Committee on Rules for Civil Procedure appointed in 1935 had no coherent or consistent view of the limitations imposed by the Act's procedure/substance dichotomy. It also suggests, however, that unlike the Supreme Court in *Sibbach* and subsequent cases, the original Advisory Committee recognized the basic purpose of the Act's procedure/substance dichotomy and occasionally adverted to the Act's pre-1934 history. Finally, a review of the work of the original Advisory Committee reveals that it followed a principle of court rulemaking that, the pre-1934 history of the Act aside, casts specifically in doubt—as knowledge of the Committee's approach to the procedure/substance dichotomy casts generally in doubt—the presumption of validity of Federal Rules upon which the Court has relied in interpreting the Act.

*A. The Original Advisory Committee's Approach to the Procedure/Substance Dichotomy: In General*

It is difficult if not impossible to determine how the original Advisory Committee on Rules for Civil Procedure interpreted the Act's basic limitations on rulemaking. Neither the published drafts and notes of the Committee nor the published articles and remarks of its members suggest that the Committee had agreed upon standards or guidelines to inform the procedure/substance dichotomy.<sup>528</sup> The working papers and correspondence of the Advisory Committee<sup>529</sup> confirm that perceived problems of power

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ever, of precluding analysis of some Federal Rules that have been challenged in the lower federal courts or that otherwise have provoked controversy. Prime among them is Rule 23, as amended in 1966, dealing with class actions. See, e.g., Landers, *supra* note 31. Notwithstanding, the discussion in this section should clearly suggest the implications of the pre-1934 history of the Act for such Rules.

<sup>528</sup> See, e.g., *infra* text accompanying notes 547-48, 567-74, 587, 613-14, 628 & 723-24; Clark, *Supreme Court Power*, *supra* note 41; Clark & Moore, *supra* note 36; Sunderland, *supra* note 36; Sunderland, *supra* note 166.

<sup>529</sup> The official working papers and correspondence of the Advisory Committee remain restricted, although there is reason to hope that they will be made generally accessible to scholars and that permission will be granted to cite their contents. In the meanwhile, substantial portions of the papers and correspondence of the Committee are accessible in various libraries throughout the country. The author has reviewed three collections of such papers. First, in the Harvard Law Library is a nine-volume set containing most of the communications of the Advisory Committee, including unpublished drafts, comments and some correspondence among members of the Committee, donated by Edmund M. Morgan, who was a member. Communications of the Advisory Committee on Rules for Civil Procedure for the District Courts of the United States [hereinafter cited as Communications of the Advisory Committee]. The Harvard collection also includes a six-volume transcript of the proceedings of the Advisory Committee at meetings held on February 20-25, 1936. Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure

were approached without a shared conception of the Act's limitations and that the resolutions of those problems were, therefore, essentially *ad hoc*.<sup>530</sup> To be sure, individual members of the

of the Supreme Court of the United States [hereinafter cited as February 1936 Transcript].

Another collection of the materials sent to members of the Advisory Committee, in fourteen volumes, is contained in the University of Chicago Law Library, donated by Edgar B. Tolman, a member and the Secretary of the Committee. U.S. Supreme Court Advisory Committee on Rules for Civil Procedure, Materials, 1934-1939. Because the Chicago volumes have been classified as rare books, citations will be to Communications of the Advisory Committee, *supra*.

A much more extensive set of materials, including the communications of the Committee, the transcripts of most of its proceedings, and substantial correspondence, can be found in the Sterling Library of Yale University, Manuscripts and Archives. This set is contained in Series IV of the papers of Charles E. Clark, the Reporter of the Committee [hereinafter cited as Clark Papers]. I am grateful to the Yale University Library for permission to publish material in the Charles E. Clark Papers. For a case in which the court made use of material in the Clark Papers in resolving an issue of interpretation under the Federal Rules of Civil Procedure, see *Whalen v. Ford Motor Credit Corp.*, 684 F.2d 272 (4th Cir. 1982) (*en banc*).

Finally, papers relating to the work of the Advisory Committee can be found in the Bentley Historical Library of the University of Michigan (donated by Edson R. Sunderland), and a few unpublished drafts are in the University of Virginia Law Library. They have not been reviewed by the author. It is probable that other sets exist.

<sup>530</sup> Almost a year after the Act had been passed—when the rulemaking project was being run out of the Attorney General's office and before the Advisory Committee was appointed by the Court—there had been no study of the limitations imposed by the Act's procedure/substance dichotomy. See letter from Edward H. Hammond to E.J. Marshall (March 30, 1935) (copy on file with the *University of Pennsylvania Law Review*). After the appointment of the Supreme Court's Advisory Committee, Edgar B. Tolman sought the advice of Professor Ernest Lorenzen of Yale as to "a satisfactory distinction between procedure and substantive law." Letter from the Hon. Edgar B. Tolman to Professor Ernest G. Lorenzen (July 11, 1935) (copy on file with the *University of Pennsylvania Law Review*). He was advised by Lorenzen that any line must be arbitrary, "with the view of accomplishing a particular objective," that "any attempt to establish a formula or test by which to distinguish substantive rights from procedure would be vain," and that he should "study carefully the ends to be obtained and include the particular matter if it would be helpful toward such end: otherwise exclude it." Letter from Ernest G. Lorenzen to the Hon. Edgar B. Tolman (August 5, 1935) (copy on file with the *University of Pennsylvania Law Review*). Tolman took the advice to heart, expressing the view in a speech made after the appearance of the Advisory Committee's *Preliminary Draft*, *supra* note 520, that it would be "unwise to attempt in advance to lay down a formula by which the line between procedural and substantive law shall be determined." Address by Edgar B. Tolman, Law Club (Chicago, Illinois) (November 6, 1936) (5 Communications of the Advisory Committee, *supra* note 529).

Regarding the Advisory Committee more generally, the unpublished evidence reviewed by the author is to the same effect. At its first meeting, the Committee considered numerous questions of interpretation but did not consider, let alone agree about, the general implications of the Act's procedure/substance dichotomy for its work. See Summary of Proceedings of the First Meeting of Advisory Committee, Held in the Federal Building at Chicago, June 20, 1935 (1 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 108, Folder 42 & Box 104, Folder 35) [hereinafter cited as Summary of Proceedings].

Moreover, although the Committee resolved to be "conservative as to the fields to be covered by the rules," it also agreed that "within the fields which the rules do cover the committee should go as far as may be necessary to liberalize the procedure and reach a result that will do quick and accurate justice." *Id.*

As late as 1937, Mitchell was raising questions about the meaning of "practice and procedure" in the Act's first sentence, and only then was an effort made to collect relevant authorities. See letter from William D. Mitchell to the Hon. Edgar B. Tolman (August 6, 1937) (copy on file with the *University of Pennsylvania Law Review*); letter from the Hon. Edgar B. Tolman to Leland L. Tolman (August 10, 1937) (copy on file with the *University of Pennsylvania Law Review*). After considering a troublesome question of power raised when the proposed Rules were before the Court, Mitchell wrote to George Wharton Pepper, a member of the Committee:

I frequently am dissatisfied with myself, because after more than two years of struggling with practice and procedure, when a question arises as to whether a matter is procedure or substance, my mind is murky on the subject and I am unable to reach a conclusion in which I have confidence whenever the question is at all debatable. The truth is that the twilight zone around the dividing line between substance and procedure is a very broad one. If it were not for the fact that the court which makes these rules will decide whether they were within the authority, we would have very serious difficulties in dealing with this problem. The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one.

Letter from William D. Mitchell to the Hon. George Wharton Pepper (December 19, 1937) (copy on file with the *University of Pennsylvania Law Review*).

Finally, about the same time, Warren Olney, a member of the Advisory Committee, wrote to Mitchell expressing fears about the proposed Rules after reading an article by Mr. Ohlinger of the Toledo Bar (Ohlinger, *supra* note 36). Olney had satisfied himself that "practice and procedure" as used in the Enabling Act was not as narrow as suggested by Ohlinger, and that, of the provisions questioned by the latter, only proposed Rule 4(f) (governing the territorial limits for service of process) might exceed the authority conferred by Congress. He stated, however, that "there are instances to which the article does not refer in which it is not at all improbable that our rules do go beyond 'practice and procedure,' even under the broad conception on which the Committee proceeded, although as I remember it, all of these instances were of a minor character." Olney suggested that direct approval of the Rules should be sought from Congress. Letter from Warren Olney, Jr., to the Hon. William D. Mitchell (December 30, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 59). In his response, Mitchell evinced considerably more confidence than he had in his previously mentioned letter to Senator Pepper, arguing that there were "few cases where it may be argued that we have crossed the deadline," most prominently proposed Rule 4(f), and that they were "not of any great importance." Letter from William D. Mitchell to the Hon. Warren Olney, Jr. (January 4, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 59). In this and a subsequent letter Mitchell argued against seeking legislation from Congress approving the Rules. See *id.*; letter from William D. Mitchell to the Hon. Warren Olney, Jr. (January 15, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 59).

On the Committee, I was one of those, usually in the minority, who was always raising the question of power, and taking a conservative view as to what are matters of procedure rather than substantive right, always having in mind what is troubling you, but now that the rules are in, I am all for standing by them as within the field of procedure. What if there are a few minor provisions on which the Court may ultimately have to hold are not within its rulemaking power? No great harm will be

Committee and its staff evinced awareness of the pre-1934 history, and that history was brought to bear on the consideration of a few issues of interpretation.<sup>531</sup> But the use was occasional, and one leaves the published and unpublished sources with the impression that, although the Committee may have recognized the basic purpose of the procedure/substance dichotomy, in formulating and applying the Act's limitations normative considerations took a back seat to practical possibilities.

In part, this was a process of default. The literature on, and other interpretations of, the Act available to the Committee often raised false issues or suggested the wrong standards for deciding real issues. For example, notwithstanding his familiarity with the ABA's long campaign and the pre-1934 history, and notwithstanding Attorney General Cummings' posture in resuscitating the campaign,<sup>532</sup> Professor Sunderland fought a rearguard action against uniform Federal Rules even after the Act was passed. His early articles on the Enabling Act<sup>533</sup> argued that it should be interpreted to authorize, if not to require, strict conformity to state law (as opposed to the manipulable conformity permitted by the Conformity Act of 1872, as it was interpreted<sup>534</sup>). Those articles were striking pieces of revisionism insofar as they purported to describe the intent of the draftsmen of the uniform federal procedure bill,<sup>535</sup> even accepting the author's erroneous claim of ABA authorship.<sup>536</sup> Sunderland's purpose in distorting the record probably was linked with his view that national uniformity in the procedural field was undesirable because it would foreclose state experimentation.<sup>537</sup> In any event, his prominence as a scholar insured that his views were taken more seriously than they deserved, even by those who knew better,<sup>538</sup> and they occupied a good

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done, and my guess is that the bar will assume that the Court will stand by its rules, and it is unlikely that assaults of that kind will be made.

*Id.*

<sup>531</sup> See, e.g., *infra* notes 539 & 554; see also *supra* note 166.

<sup>532</sup> See *supra* text accompanying notes 362-65.

<sup>533</sup> Sunderland, *supra* note 36; Sunderland, *supra* note 166.

<sup>534</sup> See *supra* text accompanying notes 99-113.

<sup>535</sup> See Sunderland, *supra* note 36, at 1128; Sunderland, *supra* note 166, at 405.

<sup>536</sup> See *supra* text accompanying notes 253-68.

<sup>537</sup> See *supra* text accompanying note 334; Sunderland, *supra* note 36, at 1125-27.

<sup>538</sup> See, e.g., Wickes, *supra* note 36, at 11-15, 30-32. Compare *Supreme Court Needs Rule-Making Commission*, 18 J. AM. JUDICATURE Soc'y 131 (1935) with *Policies Involved in Federal Rule Making*, 18 J. AM. JUDICATURE Soc'y 134 (1935).

In more recent years, Sunderland's articles have been regarded as a primary source for those working with the Act. As a result, a good deal of misinformation

deal of attention at the first meeting of the Advisory Committee.<sup>539</sup>

In addition, the Advisory Committee's approach may have been affected by the attitude—emerging in scholarly circles at the time and widely accepted today—that procedure and substance cannot usefully be distinguished by any *a priori* formula, and that therefore the best one can do is to think deeply (and instrumentally) about particular problems.<sup>540</sup>

Finally, the Committee's Reporter was more committed to the integrity of the Rules than he was to the Act's limitations. Accordingly, he made or sponsored arguments that, although

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has been perpetuated. See, e.g., Miller, *supra* note 23, at 739: "Its [the Act's] failure to trumpet any grandiose legislative purpose merely reflects the indecision of the act's draftsmen and sponsors as to whether uniformity of practice among the state and federal courts in the same jurisdiction was more desirable than uniformity among the federal courts throughout the country."

<sup>539</sup> See Summary of Proceedings, *supra* note 530; letter from Charles E. Clark to Edson R. Sunderland (June 22, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 42). Indeed, since it was never more likely than in 1935 that Sunderland's revisionism would be recognized as such, it is probable that his untenable interpretations of the Act with respect to conformity, rather than, as Dean Clark later claimed, other, legitimate, questions of interpretation he raised, caused Mr. Mitchell to be "profoundly disturbed" and "to question Sunderland's potential usefulness for the work, even as a committee member." Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 9 (1959).

This supposition finds support in a letter written by Mitchell to Sunderland expressing disagreement with three of the latter's interpretations of the Act, which are reflected in Sunderland, *supra* note 36, and Sunderland, *supra* note 166. Mitchell took up the issue of conformity first, adducing the Act's reference to "general rules," the grounds of Senator Walsh's opposition to the uniform federal procedure bill and the intent of the 1911 ABA resolution, in support of his conclusion, clearly correct, that the Act contemplates "rules that prevail generally in all the district courts, that is, a uniform set of rules applicable generally in each of the districts." Letter from William D. Mitchell to Edson R. Sunderland (May 23, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 41).

The correspondence in the Clark Papers suggests that, far from saving Sunderland from total exclusion from the Advisory Committee, as he later claimed, Clark ensured that he and not Sunderland would be selected as Reporter by bringing the latter's views to Mitchell's attention. See letter from Charles E. Clark to William D. Mitchell (May 17, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 41); letter from William D. Mitchell to Charles E. Clark (May 24, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 41); letter from Charles E. Clark to William D. Mitchell (May 25, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 41). In that regard, Mitchell wrote to Clark that he was "a little disconcerted at [Sunderland's] conclusions," letter from William D. Mitchell to Charles E. Clark, *supra*, hardly the level of disturbance Clark subsequently attributed to him. And it was Clark who, at least in the correspondence, expressed doubt about Sunderland's fitness for the position of Reporter. Letter from Charles E. Clark to William D. Mitchell (May 25, 1935), *supra*.

Although Sunderland's misinterpretation of the Act on the issue of uniformity or conformity was one of the most extreme in the literature, it was not his only error, and he was hardly alone. See, e.g., *supra* notes 166, 256, 268 & 387 and *infra* text accompanying notes 552-69.

<sup>540</sup> See letter from Ernest G. Lorenzen to the Hon. Edgar B. Tolman, *supra* note 530.

surely instrumental, ignored other basic tenets of scholars whose leader, as Dean of the Yale Law School, he was.<sup>541</sup>

In various public pronouncements during the drafting of the Rules and their consideration by Congress, members of the Advisory Committee assured their audiences that the task of observing the procedure/substance dichotomy had proved not very difficult.<sup>542</sup> The truth, however, was that, having failed to address the problem at all systematically, the Committee was forced, and in most cases was quite content, to rely largely on judgments informed by a sense of the professional and political climate and by the hope that the Supreme Court would preserve it from error.<sup>543</sup>

*B. Specific Problems of Power Noted by the Original  
Advisory Committee or Resulting from its Approach*

1. Evidence

The original Advisory Committee brought to the attention of the Supreme Court many questions of power it had identified in the drafting process. One of the most interesting, because it has been the subject of recent controversy, concerned the Court's power under the Enabling Act to promulgate Federal Rules in the area of evidence. This was one of the few areas in which the Commit-

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<sup>541</sup> See, e.g., *infra* note 620. On other occasions, Clark's attitude was closer to home but still worthy of interest. In the debate about the power of the Court to promulgate amendments to the Civil Rules without submitting them to Congress, see *supra* note 268; *infra* note 601. Clark noted in a letter to Tolman that Professor Moore had "always laughed slyly at my Harvard Law Review article [Clark, *Supreme Court Power*, *supra* note 41] on the basis that there I did much rewriting of the Act." Letter from Charles E. Clark to Edgar B. Tolman (October 15, 1938) (Clark Papers, *supra* note 529, Box 113, Folder 65) (extract with letter from Charles E. Clark to Monte M. Lemann (November 1, 1938)). He continued: "I have answered that some one must do it and that I was affording a logical basis therefor." *Id.* See also *infra* text accompanying note 546.

Other members of the Committee followed the lead of Dean Clark and his staff in confounding analysis under the Act with the analysis of "procedure" and "substance" made for other purposes. For example, although Mr. Mitchell recognized that the Act's procedure/substance dichotomy had a function in federal question cases, see, e.g., *infra* note 620, he assumed that the same classification would govern the matter of costs under the Act and under the Rules of Decision Act. See letter from William D. Mitchell to the Hon. Charles E. Clark (October 13, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 58).

<sup>542</sup> See, e.g., CLEVELAND INSTITUTE, *supra* note 433, at 182-83 (statement of W.D. Mitchell): "This problem at first approach seems difficult. The Advisory Committee found very little difficulty with it. It is astonishing how many decisions there are in the Supreme Court and the other courts which define the difference between procedure, on the one hand, and substantive rights, on the other." See also 1938 *Senate Hearings*, *supra* note 435, at 9 (statement of W.D. Mitchell).

<sup>543</sup> See, e.g., letter from William D. Mitchell to the Hon. George Wharton Pepper, *supra* note 530; letter from William D. Mitchell to the Hon. Warren Olney, Jr. (January 15, 1938), *supra* note 530.



tee brought the pre-1934 history to bear on its interpretation of the Act. Although it successfully resisted pressure to deal comprehensively with evidence, the Committee's ultimate treatment was a product of compromise. Nevertheless, a review of its deliberations confirms what is apparent from the pre-1934 history, that Congress was faithful to the original understanding in refusing to acquiesce in the proposed Federal Rules of Evidence in 1973.<sup>544</sup>

In the Foreword to the May 1936 Preliminary Draft, evidence was but one of a number of questions of power noted by the Advisory Committee. The extent to which the Committee's interpretations of the Act were dictated by perceived necessity is strikingly apparent.<sup>545</sup> Thus, the Committee noted with respect to evidence: "There is some difference of opinion in the Committee as to the extent to which the statute authorizes the Court to make rules dealing with evidence. We have touched the subject as lightly as possible. We felt it quite essential to go this far . . ."<sup>546</sup> In a Note to the Supreme Court accompanying the general rule on evidence in the April 1937 Report, the Committee observed:

The first impression of the Committee was against touching the field of evidence. It later became clear that on account of the union of law and equity there would be doubt as to the rules of evidence to be applied. *We think it essential to deal with the subject at least to the extent expressed in subdivision (a) of this rule. Having gone that far, the Committee made the further provisions in subdivision (b) of this rule and summarized in Rule 45, the law on proof of official records now scattered through many Federal Statutes.*<sup>547</sup>

<sup>544</sup> For Congress's actions, see *supra* text accompanying note 4; *supra* note 21.

<sup>545</sup> Many of the questions noted by the Committee related to the Court's power with respect to practice on appeals. See *Foreword to Preliminary Draft*, *supra* note 520, at viii-xviii.

The Committee felt it absolutely necessary to deal with these subjects. An elaborate memorandum has been prepared dealing with the various statutes enabling the Supreme Court to make rules of practice, and the Committee concluded that *if not the particular statute under which it is acting, then under other general statutes* the extent to which we have dealt with appeals is within the power of the Court.

*Id.* xi-xii (emphasis added). The memorandum referred to, prepared by Dean Clark and dated February 6, 1936, can be found in 2 Communications of the Advisory Committee, *supra* note 529, and in the Clark Papers, *supra* note 529, Box 105, Folder 37. See also Clark, *Supreme Court Power*, *supra* note 41, at 1308; Clark, *supra* note 256, at 450.

<sup>546</sup> *Foreword to Preliminary Draft*, *supra* note 520, at xvii.

<sup>547</sup> *Report of the Advisory Committee on Rules for Civil Procedure* 108 (1937) (Draft Rule 44) (emphasis added) [hereinafter cited as *April 1937 Report*]; see also

The draft rule was changed further in the Advisory Committee's Final Report of November 1937.<sup>548</sup> Moreover, it was changed by the Supreme Court, which deleted certain provisions in subdivision (b).<sup>549</sup>

The attitude of the original Advisory Committee towards evidence is, on the one hand, remarkable because it reminds one of a person who is only "lightly" dead.<sup>550</sup> It is remarkable on the other hand because the Advisory Committee resisted "tremendous pressure" to deal more comprehensively with the subject,<sup>551</sup> in-

CLEVELAND INSTITUTE, *supra* note 433, at 186; Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 283 (1939); Mitchell, *Some of the Problems Confronting the Advisory Committee in Recent Months*, 23 A.B.A. J. 966, 968 (1937).

<sup>548</sup> See *Final Report of the Advisory Committee on Rules for Civil Procedure* 30-31 (1937) (Draft Rule 44) [hereinafter cited as *Final Report*].

<sup>549</sup> Compare *id.* with Fed R. Civ. Pro. 43, 308 U.S. 645, 718-19 (1938). The changes made by the Supreme Court after the filing of the Advisory Committee's Final Report are collected in CLEVELAND INSTITUTE, *supra* note 433, app. III, at 429-33. See also Clark, *supra* note 252, at 252. The changes regarding evidence may have been made as a result of opposition expressed at the September 1937 meeting of the Judicial Conference. See Summary of Suggestions as to the Proposed Rules Made at the Annual Conference of the Chief Justice of the United States with the Senior Circuit Judges, September 23-25, 1937 (9 Communications of the Advisory Committee, *supra* note 529).

<sup>550</sup> In addition to the quotation from the April 1937 Report, see *supra* text accompanying note 547, see the letter from William D. Mitchell to John H. Wigmore (October 8, 1936) (Clark Papers, *supra* note 529, Box 110, Folder 51): "Having gone that far we have, of course, put ourselves in a position where we have to concede that the subject of evidence is one within the rulemaking power under this statute, and we are left with the question as to how far we should go in this direction."

<sup>551</sup> CLEVELAND INSTITUTE, *supra* note 433, at 186 (statement of W.D. Mitchell).

Some of the pressure came from Dean Clark, the Reporter, and from Edgar B. Tolman, the Secretary of and a major force on the Advisory Committee. At its first meeting on June 20, 1935, the Committee had decided that the broad field of evidence, in particular rules of competency and admissibility, was not within the Act's grant of authority and that the Rules should be limited to modes of taking and obtaining evidence, as by depositions and discovery. See Summary of Proceedings, *supra* note 530. Clark expressed the hope to Professor Morgan that it would be possible to draft "at least a few rules touching evidence in the federal courts." Letter from Charles E. Clark to Edmund M. Morgan (October 12, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 43). Morgan doubted whether the Committee "could do anything worthwhile in the time now limited." Letter from Edmund M. Morgan to Charles E. Clark (October 16, 1935) (Clark Papers, *supra* note 529, Box 108, Folder 43). Clark then encouraged Tolman to "press further the suggestion [he] made . . . as to a simple rule dealing with evidence." Letter from Charles E. Clark to Edgar B. Tolman (November 21, 1935) (Clark Papers, *supra* note 529, Box 109, Folder 44). Tolman, who had corresponded with various academic commentators on the propriety of Federal Rules in the area of evidence and who was consulting with Dean Wigmore, was also dissatisfied and did press for more comprehensive treatment. See E. Tolman, Memorandum to the Advisory Committee In re-Rule A6 (January 14, 1936) (2 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 105, Folder 37); letters from Edgar B. Tolman to Charles E. Clark (January 17, 23, 1936) (Clark Papers, *supra* note 529, Box 109, Folder 45); letter from Edgar B. Tolman to Charles E. Clark (January 27, 1936) (Clark Papers, *supra* note 529, Box 109, Folder

cluding pressure from scholars who purported to demonstrate that the Act authorized the Supreme Court to do so.<sup>552</sup> Notwithstanding the Committee's stated ambivalence and the action of the Supreme Court in deleting some of the proposed provisions regarding evidence, the fact that the subject was touched at all, however "lightly," in the original Federal Rules of Civil Procedure was subsequently advanced as proof that authority existed for a far more ambitious endeavor, the Federal Rules of Evidence.<sup>553</sup> On

47). Clark supported Tolman's efforts. *See, e.g.*, letters from Charles E. Clark to Edgar B. Tolman (January 20, 25, 1936) (Clark Papers, *supra* note 529, Box 105, Folder 45); letters from Charles E. Clark to William D. Mitchell (January 28 & February 1, 1936) (Clark Papers, *supra* note 529, Box 109, Folder 47). Chairman Mitchell opposed the proposal but left open the possibility that he might be persuaded to a different view if some additional provisions were necessary in light of the merger of law and equity. *See* Comments of Mr. Wm. D. Mitchell on Tentative Draft II (February 11, 1936) (2 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 105, Folder 37) [hereinafter cited as Mr. Mitchell's Comments]. Tolman and Clark carried the argument at the February 1936 meeting of the Advisory Committee. *See* 4 February 1936 Transcript, *supra* note 529, at 949-94. This transcript can also be found in the Clark Papers, *supra* note 529, Box 95, Folder 11. *See also* letter from William D. Mitchell to John H. Wigmore (October 8, 1936), *supra* note 550.

<sup>552</sup> *See, e.g., supra* note 551; *infra* note 562 (Dean Wigmore); Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 YALE L.J. 622 (1936); letter from Mason Ladd to Edgar B. Tolman (December 17, 1936) (6 Communications of the Advisory Committee, *supra* note 529); *see also* Sweeney, *Federal or State Rules of Evidence*, 27 ILL. L. REV. 394 (1932); *cf.* Sunderland, *supra* note 166, at 406-07 (asserting power but doubting whether it should be exercised). *But see* Wickes, *supra* note 36, at 18-28; Williams, *supra* note 19, at 462-64.

For Dean Clark's doubts about the timing of the publication of the article by Callahan and Ferguson, Sterling Fellows at Yale (who, however, were not under his direct supervision), *see* letter from Charles E. Clark to Edgar B. Tolman (January 25, 1936), *supra* note 551; letter from Charles E. Clark to William D. Mitchell (February 1, 1936), *supra* note 551. He quickly overcame his doubts and relied on the forthcoming article in comments for the Committee's February 1936 meeting. *See* C. Clark, *Suggestions and Agenda—Tentative Draft II* (2 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 105, Folder 37); *see also* letter from Charles E. Clark to Edgar B. Tolman (February 29, 1936) (2 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 105, Folder 37 & Box 109, Folder 47) (enclosing Callahan & Ferguson, *supra*, for distribution). Later, Clark stimulated Callahan and Ferguson to publish their thesis in the hope that it might lead the Advisory Committee to go "even further as you recommend." Letter from Charles E. Clark to Edwin K. Ferguson (May 13, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 57).

It requires either an unusual notion of "consensus" or a careful definition of "rules of evidence" to say that "[t]here has always been a consensus among the commentators that the Rules Enabling Act delegates sufficient authority to the Supreme Court to permit the promulgation of rules of evidence for the federal courts." Miller, *supra* note 23, at 739 (footnote omitted). As the citations in the author's footnote reveal, there was a close division among the commentators in the years immediately following the Act's passage, which, for this purpose, should presumably be regarded as the most relevant period. *See also supra* note 329.

<sup>553</sup> *See, e.g., UNITED STATES JUDICIAL CONFERENCE, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, A PRELIMINARY REPORT ON THE ADVISABILITY AND FEASIBILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS* 34 (1962) [hereinafter cited as PRELIMINARY EVIDENCE REPORT];

the contrary, the public progress of the original Civil Rules suggests, and the papers of the Advisory Committee confirm, that the Committee took seriously, even if it did not fully respect, the Act's limitations as reflected in the pre-1934 history.<sup>554</sup>

The main difficulty with the efforts of most scholars who attempted to determine the validity under the Act of Federal Rules in the area of evidence has been ignorance or neglect of the pre-1934 history, including in particular ABA and legislative reports.<sup>555</sup> A second and related source of difficulty has been the failure or refusal to mark a distinction between Federal Rules regulating the mode of taking and obtaining evidence and Federal Rules regulating the admissibility of evidence.<sup>556</sup> The authorization in

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Degnan, *supra* note 22, at 277-82; Moore & Bendix, *Congress, Evidence and Rule-making*, 84 YALE L.J. 9, 12 n.17 (1974); *see also* Miller, *supra* note 23, at 740; Clark, *supra* note 252, at 252.

<sup>554</sup> *See supra* text accompanying notes 547-50; *supra* note 551. The Advisory Committee's original position on evidence was based in part on the absence of any suggestion in the pre-1934 ABA or congressional materials that the Act authorized Federal Rules dealing with questions of competency or admissibility. *See* Summary of Proceedings, *supra* note 530; *see also* letter from William D. Mitchell to John H. Wigmore, *supra* note 550.

<sup>555</sup> *See, e.g.*, sources cited *supra* notes 522 & 523. Professor Miller cited one part of the 1926 Senate Report but ignored those parts of it that bore directly on the question he was addressing. *See* Miller, *supra* note 23, at 743-44 & n.501; *cf.* Stein, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 639, 644 & n.94 (1940) (recognizing that Shelton's legislative class of procedure included rules of evidence but asserting that "[s]uch a differentiation has not been followed.").

<sup>556</sup> *See supra* text accompanying notes 516-18. Callahan & Ferguson, *supra* note 552, at 624-25 n.13, whose article may have been influential in moving the Advisory Committee from its original position on evidence, *see supra* note 552, noted that "[a] distinction has been drawn between 'Mode of Proof,' or the manner of taking evidence, and a rule of evidence," *citing* Bryant v. Leyland, 6 F. 125, 127 (C.C.D. Mass. 1881) and Chicago & Northwestern Ry. Co. v. Kendall, 167 F. 62, 65 (8th Cir. 1909). They argued, however, that such a distinction was vitiated by Equity Rule 64, and thus that the Supreme Court's failure to deal more extensively with evidence in its Equity Rules should be attributed to the lack of need rather than to limitations imposed by the "Mode of Proof Act," Rev. Stat. § 862 (1872). Callahan & Ferguson, *supra* note 552, at 624-25 & n.13; *see also* Stein, *supra* note 555, at 641, 643. Since Rule 64 merely authorized the use before a master of documents previously "made, read, or used in the court," 226 U.S. 668 (1912), the argument is not a strong one. Moreover, at the most it proves the assertion of power, and a very limited one, rather than its existence. Finally, the argument misdirects attention, disregarding the limited purpose of the Mode of Proof Act and neglecting the statute authorizing the Equity Rules, which was discussed in *Bryant* and which made precisely the distinction Callahan and Ferguson argued against. *See infra* notes 560-61; *see also* 226 U.S. 661 (1912) (Equity Rule 46); Leach, *State Law of Evidence in Federal Courts*, 43 HARV. L. REV. 554, 579-81 (1930). This was also the distinction originally made by the Advisory Committee, *see supra* note 551, and emphasized by Mitchell in response to Tolman's memorandum, *see* Mr. Mitchell's Comments, *supra* note 551 ("I draw a sharp distinction between the mode of taking evidence, and the rules as to competency and admissibility. The equity rules now deal with the mode of taking evidence, but contain not a word as to competency or admissibility.").

the Clayton and Sutherland bills to prescribe "the mode . . . of taking and obtaining evidence"<sup>557</sup> by itself speaks neither one way nor the other to the question of power to promulgate Federal Rules in the broad field of evidence under the Enabling Act.<sup>558</sup> In the context of the history as a whole, however, it supports the view that the Act carves up that field for rulemaking purposes, drawing the line at questions of admissibility.<sup>559</sup>

Against this background, the treatment of evidence in the original Federal Rules of Civil Procedure is comprehensible even if not wholly consistent. The Committee felt free to recommend Federal Rules regulating modes of "taking and obtaining evidence," as in the rules on discovery.<sup>560</sup> The Committee was at pains, however, to note that the use of depositions at trial was "limited in substantially the same ways as at present."<sup>561</sup> The other original Federal Rules of Civil Procedure that dealt in some way with evidence and that have been cited in support of plenary authority under the Act by and large avoided questions of admissibility.<sup>562</sup> Rule 43(a), the original general Federal Rule

<sup>557</sup> See *supra* note 228.

<sup>558</sup> See *supra* note 517. But see Callahan & Ferguson, *supra* note 552, at 642 n.100 (asserting that the Sutherland bill "expressly included in the grant the matter of 'taking and obtaining evidence,'" and thus neglecting the precise language of the bill); Miller, *supra* note 23, at 741 (doing the same).

<sup>559</sup> See *supra* text accompanying note 517; *supra* note 556.

<sup>560</sup> See FED. R. CIV. P. 26-37; Summary of Proceedings, *supra* note 530. The 1842 statute that conferred broad rulemaking authority on the Supreme Court, see *supra* note 103, separately enumerated the power "to prescribe, and regulate, and alter . . . the forms and modes of taking and obtaining evidence, and of obtaining discovery." The distinction was carried forward in Rev. Stat. § 917 (1872), which preserved the Court's rulemaking power in equity and admiralty at the time that it was taken away in civil actions at law by the Conformity Act. See *supra* text accompanying note 105. However, the grants were treated as fungible, see Bryant v. Leyland, 6 F. 125, 126-27 (C.C.D. Mass. 1881), and the latter was probably omitted in the Cummins bill, see *supra* text accompanying notes 259 & 268, as redundant.

<sup>561</sup> Foreword to Preliminary Draft, *supra* note 520, at xvi. See also April 1937 Report, *supra* note 547, at 71-72 (Draft Rule 26); Notes to Rules of Civil Procedure for the District Courts of the United States 29 (1938) (Rule 26) [hereinafter cited as Advisory Committee Notes]; Memorandum on S.J. Res. 281 (April 21, 1938) (Clark Papers, *supra* note 529, Box 112, Folder 61). The Advisory Committee proposed Federal Rules, even if substantive under its interpretation of the Act, so long as they incorporated existing federal law. That approach is discussed and criticized *infra* text accompanying notes 577-609. Chairman Mitchell had argued vigorously against a proposed Rule that would have abolished statutory restrictions on the use of depositions. See Mr. Mitchell's Comments, *supra* note 551.

On the special problem of taking and using depositions in federal actions prior to the Act, see A. DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE § 187 (1928); see also Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 100 (1923).

<sup>562</sup> See, e.g., Miller, *supra* note 23, at 740; Moore & Bendix, *supra* note 553, at 12 n.17. The Rules adduced by these authors include Rules 26-37 (depositions and discovery), 41(b) (involuntary dismissal), 43 (evidence), 44 (proof of official

regulating evidence, is, however, difficult to justify.<sup>563</sup> Viewed as a direction and broad grant of authority to the district courts to admit evidence that would be excluded by an Act of Congress or by state law, the Rule makes a choice that, if one accepts the relevance of the pre-1934 history, runs afoul of the Act.<sup>564</sup> The Rule, however, need not be, and was not consistently so viewed;<sup>565</sup> under the narrower interpretation, although the choice involved was for Congress, the damage done to the Act's allocation scheme is considerably reduced.<sup>566</sup>

record), 45 (subpoena), 46 (exceptions unnecessary), 50 (motion for a directed verdict), 59(a) (grounds for new trial), 60 (relief from judgment or order), 61 (harmless error), 68 (offer of judgment), and 80 (stenographer; stenographic report or transcript as evidence). Of these, aside from Rule 43, see *infra* text accompanying note 563, the most troublesome on its face is Rule 44. The Advisory Committee added the latter at the urging of Dean Wigmore. See Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration*, 22 A.B.A. J. 811, 813 (1936); *Preliminary Draft*, *supra* note 520, at 93; *April 1937 Report*, *supra* note 547, at 113; letter from Edgar B. Tolman to Charles E. Clark (January 23, 1936), *supra* note 551. Again, however, it took comfort in the fact that Wigmore's proposals could be seen as "consolidating and simplifying the federal statutes on proof of official records and filling some of the gaps in this field." *Preliminary Draft*, *supra* note 520, at 93; see also *Advisory Committee Notes*, *supra* note 561, at 38 (Rule 44).

<sup>563</sup> Rule 43(a) provided:

- (a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

308 U.S. at 718.

<sup>564</sup> See *supra* text accompanying notes 516-18. Such a view of the Rule as proposed in the Final Report was taken in Callahan & Ferguson, *Evidence and the New Federal Rules of Civil Procedure*: 2, 47 YALE L.J. 194, 198 (1937), where the authors argued that the reference to evidence in equity "does give the courts a free hand in applying reforms to individual rules, thus keeping them abreast of the times." See *id.* 197; see also letter from Charles E. Clark to the Hon. Robert McWilliams (June 25, 1938) (Clark Papers, *supra* note 529, Box 112, Folder 62). For the probable origins of the Callahan and Ferguson article, see *supra* note 552.

<sup>565</sup> See, e.g., 1 J. WIGMORE, EVIDENCE § 6c, at 201-02 (3d ed. 1940). For subsequent commentary on Rule 43 in operation, see, e.g., Green, *The Admissibility of Evidence Under the Federal Rules*, 55 HARV. L. REV. 197 (1941); Thompson, *Federal Rule 43(A)—A Decadent Decade*, 34 CORNELL L.Q. 238 (1948); Clark, *Foreword*, 10 RUTGERS L. REV. 479, 482 (1956); see also PRELIMINARY EVIDENCE REPORT, *supra* note 553, at 19-26.

<sup>566</sup> Under this narrower interpretation, the reference in Rule 43 to evidence in equity had "little prospect of service," 1 J. WIGMORE, *supra* note 565, at 201, and the scope for the choice in favor of admissibility was markedly reduced. See Wellborn, *supra* note 82, at 407 (who also points out that the Rule was not narrowly

## 2. Registration of Judgments

In addition to indicating doubt about the Court's power to promulgate Federal Rules relating to evidence in the Foreword to the Preliminary Draft, the Advisory Committee pointed out that its proposed Rule respecting the registration of federal judgments raised a question of power.<sup>567</sup> The same question was noted in the April 1937 Report,<sup>568</sup> and in its Final Report, the Committee stated that a memorandum on the subject was "available for the use of the Court."<sup>569</sup> Notwithstanding a last minute at-

construed by many federal courts). Moreover, it should be recalled that the exclusion from the rulemaking power of all Federal Rules governing the admissibility of evidence is difficult to justify according to the standards reflected in the 1926 Senate Report. See *supra* text accompanying note 518.

During the discussion of evidence at the February 1936 meeting of the Advisory Committee, the following exchange occurred:

The Chairman. . . . When you come to enlarge the rules of evidence in law cases beyond that established by existing law, then you are getting into changing the rules of evidence, and I am still in doubt whether we have the power.

Mr. Morgan. I think, if you put that up to the Court, they would say, as the servant girl said, "It is such a little baby." (Laughter).

4 February 1936 Transcript, *supra* note 529, at 974.

<sup>567</sup> See Foreword to Preliminary Draft, *supra* note 520, at xvii-xviii.

<sup>568</sup> See April 1937 Report, *supra* note 547, at 199 (Draft Rule 77).

<sup>569</sup> Final Report, *supra* note 548, at 49. As finally recommended by the Advisory Committee, Draft Rule 77 provided, in pertinent part:

A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment. When so registered the judgment has the same effect and like proceedings for its enforcement may be taken thereon in the court in which it is registered as if the judgment had been originally entered by that court. If in the court in which the judgment was originally entered the judgment has been satisfied in whole or in part or an order has been made modifying or vacating it or affecting or suspending its operation, the party procuring the registration shall and any other party may file authenticated copies of the satisfaction or order with the court in which the judgment is registered.

*Id.* 49; April 1937 Report, *supra* note 547, at 197-98. The memorandum referred to in the Final Report had been prepared by Joseph Friedman, who was then at Yale, and was sent to Tolman by Dean Clark for distribution to the Advisory Committee, in January 1937. Letter from Charles E. Clark to Edgar B. Tolman (January 14, 1937) (Clark Papers, *supra* note 529, Box 106, Folder 38 & Box 110, Folder 53). Such a memorandum had been requested by Mr. Mitchell, who observed: "We all agree the system provided for in Rule 85 is good and ought to be adopted. The question is whether the Court can establish that system as a mere matter of practice and procedure or whether it goes into the field of substantive rights and requires legislation." Letter from William D. Mitchell to Charles E. Clark (November 5, 1936) (Clark Papers, *supra* note 529, Box 110, Folder 51) (emphasis added). Friedman's memorandum concluded, among other things, that the Rule (Rule 85 in the Preliminary Draft) would change subject-matter jurisdiction and venue requirements and would deprive a judgment-debtor of certain defenses. See Friedman, Effect of Rule 85 (Registration of Judgments) Upon the Rights of a Judgment-Debtor Under Present Federal Practice (6 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 106, Folder 38).

tempt by members of the Advisory Committee to preserve the proposed Rule, the Court deleted it.<sup>570</sup>

### 3. Provisional and Final Remedies

Throughout the rulemaking process, as reflected in the published drafts, the Advisory Committee adopted a cautious approach to provisional and final remedies. The basic Federal Rules as to both required dynamic conformity to state law except where a federal statute otherwise provided.<sup>571</sup> Although published comments and questions by individuals on the Committee suggest un-

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At the February 1937 meeting of the Advisory Committee, Chairman Mitchell suggested that the Committee indicate to the Court its feeling that Rule 85 was "beyond the scope of the power of this Committee under the statute." Another member recommended retaining the proposed Rule but indicating doubt as to power. Eight members voted that Rule 85 was within the Act's grant of authority; two were contrary-minded, and one was doubtful. Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (February 1-4, 1937) (Clark Papers, *supra* note 529, Box 104, Folder 35) [hereinafter cited as February 1937 Transcript]. Nonetheless, when the proposed Rule was before the Court, Professor Sunderland, who had drafted it, prepared a memorandum supporting its validity. Sunderland, Memorandum in Support of Rule 77—E.R.S. (9 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 107, Folder 39). Both the Friedman and the Sunderland memoranda were transmitted to the Court. Memorandum to the Advisory Committee from Edgar B. Tolman (December 8, 1937) (9 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 107, Folder 39).

During the period of congressional consideration of the Rules, and after hearing opposition to Rule 4(f), Chairman Mitchell wrote to the Advisory Committee that Rule 77 on registration of judgments would have aroused opposition in Congress and that he was grateful the Court had deleted it. Mitchell, Memorandum to the Members of the Advisory Committee (April 21, 1938) (Clark Papers, *supra* note 529, Box 112, Folder 61); *see also* letter from William D. Mitchell to the Hon. Warren Olney, Jr. (January 15, 1938), *supra* note 530.

<sup>570</sup> *See supra* note 569; CLEVELAND INSTITUTE, *supra* note 433, app. III, at 429; *see also id.* 180 (statement of W.D. Mitchell); 1938 *Senate Hearings*, *supra* note 435, at 20 (statement of E.B. Tolman); 1 MOORE & FRIEDMAN, *supra* note 526, at 44-48; Clark, *supra* note 252, at 251-52. The matter has since been dealt with in a federal statute. *See* 28 U.S.C. § 1963 (1976).

<sup>571</sup> *See* FED. R. CIV. P. 64, 69. Similar subdivisions in the Preliminary Draft specifying the persons to issue and serve the process for such remedies were deleted. Compare Preliminary Draft, *supra* note 520, at 141 (Draft Rule 78), 148-49 (Draft Rule 83) with April 1937 Report, *supra* note 547, at 176 (Draft Rule 69), 192-93 (Draft Rule 75). Apparently, this was done because the matters were thought to be already covered in the Rules and also in order to shorten them. *See* letter from Charles E. Clark to Edward J. Lonergan (October 17, 1938) (Clark Papers, *supra* note 529, Box 112, Folder 63).

In the Advisory Committee Notes, *supra* note 561, at 60, the Committee observed: "No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting state laws of property . . ." A memorandum prepared by Joseph Friedman had reached that conclusion. *See* Friedman, The Status of the Federal *Lis Pendens* (August 20, 1936) (4 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 106, Folder 38).



happiness with this approach and freedom to take some other,<sup>572</sup> there is also evidence in the published sources that the Committee perceived questions of power.<sup>573</sup> Unpublished sources confirm both the unhappiness and the concern about power under the Act. Read together, the published and unpublished sources evince no shared conception of the Act's limitations with which to address that concern.<sup>574</sup>

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<sup>572</sup> In 1938 Chairman Mitchell observed:

I have only one regret about the work of the Advisory Committee. The new federal system contains no rules prescribing the practice in seeking such provisional remedies as attachment, garnishment, proceedings supplementary to execution, and so forth. The federal rules leave this practice to be regulated by existing federal statutes, and where there are none, to local state practice. The Advisory Committee could not cover that field without considerable further delay in promulgating the new system. If the Supreme Court appoints a standing advisory committee, I hope that one of its first tasks will be to draft a simple and flexible set of rules in that field which will thus complete the last step towards uniformity in the federal courts and at the same time supply the states with a model system to which they may conform.

Mitchell, *Uniform State and Federal Practice: A New Demand For More Efficient Judicial Procedure*, 24 A.B.A. J. 981, 982 (1938); see also CLEVELAND INSTITUTE, *supra* note 433, at 185 (statement of W.D. Mitchell). Note, however, that Mitchell may well have been referring to aspects of provisional and final remedies that do not raise problems of power under the Act interpreted in light of the pre-1934 history.

<sup>573</sup> In 1935 Professor Sunderland had suggested that the Act might confer very broad authority, including with respect to "mesne and final process and every type of auxiliary remedy." Sunderland, *supra* note 166, at 406. He went on to observe, however:

A question might perhaps be raised whether the right to arrest the person or seize property on original process, or the right to employ attachment, garnishment, execution or other similar remedies, all of which constitute direct interference with personal liberty or control over property, ought, on grounds of public policy, to be deemed procedural rather than substantive.

*Id.* Sunderland suggested that conformity to state law would avoid the problem. See *id.*

In 1936, the Reporter solicited the help and advice of the bar on two questions raised by the Preliminary Draft:

Thus, in the matter of provisional remedies, such as attachment and garnishment, we have retained conformity to state procedure. Would the bar prefer some attempt at substituting uniformity here? The rules of evidence, while made more liberal by this draft, are stated only in broad general terms. Would the bar prefer further regulation and specification of detail in the field of evidence?

Clark, *supra* note 256, at 451 (footnotes omitted). The joinder of these questions does not appear to have been fortuitous.

<sup>574</sup> At its first meeting, the Advisory Committee tentatively determined to leave "the subjects of attachments and garnishments of property and arrest of persons in civil cases . . . untouched by the new rules, allowing them to be dealt with under the present system, which in most districts follow the local state law." Summary of Proceedings, *supra* note 530. Tolman objected, but yielded, to the proposal that provisional remedies follow state law. Suggestions of Mr. Tolman re Rules T.D. II (February 14, 1936) (2 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 105, Folder 37). Dean Clark was sympa-

In one respect the rulemakers might be said to have exceeded their power in the Rules regulating provisional and final remedies. Under the scheme of allocation emerging from the pre-1934 history, the categorical choice between federal and state law was, in theory at least, as much for Congress as would have been the formulation of discrete Federal Rules regulating the seizure of person or property.<sup>575</sup> At its first meeting, however, the Advisory Committee had determined that the Act permitted Federal Rules providing that state practice be followed.<sup>576</sup> In addition, the Advisory Committee seems to have taken the view that Federal Rules were permissible, even if substantive under the Act, so long as they perpetuated existing federal law.

#### 4. The Incorporation Principle

It can be inferred from the published sources that the Advisory Committee passed questions of power under the Act when proposed Federal Rules incorporated existing provisions of federal law. In one sense that conclusion is misleading. For the incorporation principle remained essentially inarticulate until the very end of the Committee's work, coming to the fore in the defense of proposed Federal Rules challenged before Congress.<sup>577</sup> With

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thetic but agreed that any attempt to deal comprehensively with the subject should be postponed because of difficulties of preparation and questions of state policy. Suggestions and Agenda—Tentative Draft II, *supra* note 551.

<sup>575</sup> See *supra* text accompanying note 507.

<sup>576</sup> Summary of Proceedings, *supra* note 530. In light of the interstitial nature of federal law, it is unlikely that there could be serious objection to a Federal Rule requiring conformity to state law. Moreover, the Advisory Committee at that time evidently thought the same result might obtain in the absence of any Federal Rule. See *id.* Only later would an attempt be made to fill in the gaps by local court rules or federal common law. See FED. R. CRV. P. 83; Flanders, *supra* note 515, at 233-35; *infra* note 763 and accompanying text.

<sup>577</sup> See *infra* note 584. At the 1938 Senate Hearings, Mr. Mitchell was asked by Senator Austin whether proposed Rule 64 did not supersede statutory provisions, derived from the Conformity Act, regarding attachments. He replied: "I do not think so. I do not think it had any such purpose. I think the practice in the Federal courts today in the matter of seizures of property by attachment, and so on, conforms to the state practice, and that rule simply says that shall be continued." 1938 Senate Hearings, *supra* note 435, at 8. For other proposed Rules which were explained to Congress in these terms, see, e.g., 1938 House Hearings, *supra* note 435, at 14 (Rule 17(b)), 21 (Rule 17(b)), 115 (Rule 25); cf. *id.* 115 (Rule 23(b)). In describing the Committee's approach generally, Mr. Mitchell stated: "What I meant to say when I said the law had not been changed, is that when we came to a point involving a certain public policy which we knew Congress and the country are vitally interested in, we took the utmost pains not to make a rule that would supersede or change the existing practice." *Id.* 25. In responding to the question whether he did not think the matter of substantive rights was for Congress rather than the Supreme Court, Dean Clark stated: "Yes I do, and if we had changed them I would agree with you, but I do not follow why you think it is a change,

the changes in thinking about the appropriate scope of federal common law wrought by *Erie*, the incorporation of federal decisional law in Federal Rules has proved troublesome. Even the incorporation of federal statutory law has posed problems. The original Advisory Committee can perhaps be excused for not anticipating these difficulties. In light of them, however, if the Act is to be interpreted with reference to the pre-1934 history, courts considering challenges to existing Federal Rules must be alert to the operation of the incorporation principle. Moreover, even under the current interpretation of the Act, as set forth in *Hanna*, awareness of the principle is important to the extent that it contradicts assumptions on which the Court has constructed a presumption of validity.

Reference to the incorporation principle may explain the Advisory Committee's emphasis that its proposed Rule on the use of depositions at trial substantially reflected the law as prescribed in existing federal statutes.<sup>578</sup> Similarly, in connection with the proposed Rule on provisional and final remedies, there were federal statutory provisions, the codified successors of the pertinent sections of the Conformity Act, that required conformity to state law.<sup>579</sup> This principle does not find much support in the Act or its legislative history, but simple convenience and a Supreme Court opinion were in its favor.<sup>580</sup>

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when we make the rule depend on a substantive right developed from somewhere outside of these rules themselves." *Id.* 14.

What is called here "the incorporation principle" should be distinguished from, for example, the incorporation of state law in a federal common law rule. See *infra* text accompanying notes 633-36.

<sup>578</sup> See *supra* text accompanying note 561.

<sup>579</sup> See 28 U.S.C. §§ 726-27, 729 (1926); *supra* note 100. The Advisory Committee did alter these statutory arrangements by requiring dynamic conformity rather than static conformity with discretion in the district courts to adopt subsequent changes in state law by court rule. See *Advisory Committee Notes, supra* note 561, at 60 (Rule 64), 63 (Rule 69).

<sup>580</sup> The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this Court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred.

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U.S. 629, 635-36 (1924) (footnote omitted) (emphasis added). This passage

a. *The Incorporation Principle and Derivative Suits: Cohen*

Unfortunately, a technique that may have been convenient in 1935 has been the source of difficulties since. For example, the Advisory Committee and the Court included in Federal Rule of Civil Procedure 23(b) special requirements with respect to complaints in shareholder derivative actions<sup>581</sup> borrowed from the Equity Rules,<sup>582</sup> which in turn had been borrowed from a decision of the Supreme Court.<sup>583</sup> After the Federal Rules of Civil Procedure had been promulgated and shortly after the *Erie* decision, the Chairman and the Reporter of the Advisory Committee and Professor Moore suggested that, because notions of what substantive law should govern in actions in federal court had changed, one or more of the provisions in Rule 23 (b) might be required to yield to contrary provisions in state law.<sup>584</sup> When the issue came

was quoted by the minority in the 1928 SENATE REPORT, *supra* note 340, pt. 2, at 16-17.

<sup>581</sup> Rule 23(b) provided:

- (b) SECONDARY ACTIONS BY SHAREHOLDERS. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

308 U.S. at 690.

<sup>582</sup> *Advisory Committee Notes, supra* note 561, at 24: "This is Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v. Oakland*, 104 U.S. 450 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U.S. IX." See also 1938 *House Hearings, supra* note 435, at 115 (statement of E.B. Tolman). The "verbal changes" included the extension of the action to shareholders in unincorporated associations. See *infra* note 596.

<sup>583</sup> See *Hawes v. Oakland*, 104 U.S. 450 (1882). Equity Rule 27 (following Equity Rule 94) incorporated the requirements enunciated in that case. *Ross v. Bernhard*, 396 U.S. 531, 534 n.4 (1970); *Bangor Punta Operations, Inc. v. Bangor & A.R.R. Co.*, 417 U.S. 703, 708 n.4 (1974).

<sup>584</sup> See CLEVELAND INSTITUTE, *supra* note 433, at 184 (statement of W.D. Mitchell); *id.* 265 (statement of C.E. Clark):

Subdivision (b) Mr. Mitchell spoke about yesterday. That is the old Equity Rules, almost verbatim, coming from the Equity Rules of 1912, and going back to the earlier equity rules in the case of *Hawes v. Oakland*. . . . As he suggested, there might be possibly a little question had that rule been something newly adopted, whether it was not at least on the verge of being a rule of substantive law, but since it is an ancient ruling of the court's own, it seemed to us that clearly it should be included here as it has been in the equity procedure for so many years.

See also 2 MOORE & FRIEDMAN, *supra* note 526, § 23.05, at 2252-53.

before the Supreme Court in *Cohen v. Beneficial Loan Industrial Corp.*,<sup>585</sup> it read the federal requirements as supplementary to—that is, neither displacing nor displaced by—requirements imposed by the state law in that case.<sup>586</sup>

It is difficult to classify the matters treated by original Rule 23(b) under the Act, as interpreted in light of the pre-1934 history. Mitchell's and Clark's public comments reflected a failure to distinguish between matters that are substantive for purposes of the Act and matters that are substantive for *Erie* purposes.<sup>587</sup> Professor Moore shared this misconception,<sup>588</sup> which was subsequently blessed by *Sibbach*.<sup>589</sup>

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Typically, Dean Clark's comments tended to depreciate the problem. In fact, the question of the validity of the contemporaneous ownership requirement had been raised by a number of correspondents late in 1937, before the *Erie* decision was rendered. Chairman Mitchell, in particular, was troubled, taking solace at first in the notion that, if the Advisory Committee had erred, it had merely followed the example of the Court itself in Equity Rules 94 and 27. See letter from William D. Mitchell to Arthur Berenson (December 9, 1937) (copy on file with the *University of Pennsylvania Law Review*); letter from William D. Mitchell to Edgar B. Tolman (December 8, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 59). Senator Pepper pointed out to Mitchell that the requirement derived from *Hawes v. Oakland*, 104 U.S. 450 (1882). See letter from the Hon. George W. Pepper to William D. Mitchell (December 9, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 59), which prompted Mitchell to conclude that, even if the Court had exceeded its authority in promulgating Equity Rule 94, "no harm was done because the substantive rule as stated was a mere reiteration of a substantive rule of law definitely established." Letter from William D. Mitchell to the Hon. George W. Pepper, *supra* note 530. See also letter from Edgar B. Tolman to William D. Mitchell (December 10, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 59). The next day Tolman again wrote Mitchell, noting that Edward Hammond had brought to his attention the Court's decision in *Washington-Southern Navigation Co. v. Baltimore & Florida Steamboat Co.*, 263 U.S. 629 (1924), discussed *supra* note 580, and suggesting that the author of that opinion, Mr. Justice Brandeis, might have had Equity Rule 27 in mind. Tolman also observed that he had passed other provisions in the Rules raising questions of power so long as they did not change the substantive law. See letter from Edgar B. Tolman to William D. Mitchell (December 11, 1937) (copy on file with the *University of Pennsylvania Law Review*).

In 1946 the Advisory Committee considered the validity of the contemporaneous ownership requirement in Rule 23(b)(1) after *Erie*, and although elaborately marshalling authorities, concluded that "the question is one which should not be decided by the Supreme Court *ex parte*, but left to await a judicial decision in a litigated case." 3B MOORE, *supra* note 41, at ¶ 23.1.01[4]. Rule 23 was amended in 1966. The matters formerly treated in Rule 23(b) are now treated in FED. R. CIV. P. 23.1. See also *id.* 23.2.

<sup>585</sup> 337 U.S. 541 (1949).

<sup>586</sup> *Id.* 556 (dictum); see, e.g., Dykstra, *The Revival of the Derivative Suit*, 116 U. PA. L. REV. 74, 93 (1967). But see *infra* text accompanying note 598.

<sup>587</sup> See, e.g., CLEVELAND INSTITUTE, *supra* note 433, at 184, 265. Mitchell had recognized serious questions of validity even before *Erie* was decided. See *supra* note 582. But even then he was not immune to taking a monolithic view of "procedure" and "substance." See *supra* note 541.

<sup>588</sup> See 2 MOORE & FRIEDMAN, *supra* note 526, § 23.05, at 2252-53; see also 3B MOORE, *supra* note 41, at ¶ 23.1.15[2].

<sup>589</sup> See 312 U.S. at 9-10; *supra* text accompanying notes 57-66.

At the outset, it is not apparent how the Rule can be said to have a predictable and identifiable effect on the substantive rights of a *litigant*.<sup>590</sup> Equating a shareholder with his corporation—refusing to distinguish the rights of the one from those of the other—seems appropriate to the extent that some of the Rule's requirements were responsive to perceived collusion in order to secure the benefits of federal diversity jurisdiction.<sup>591</sup> But those requirements do not appear vulnerable to attack under the Act, because it is unlikely that Congress intended to foreclose reasonable Federal Rules designed to protect jurisdiction.<sup>592</sup> Equating shareholder and corporate rights flies in the face of assumptions that may have animated another requirement in the Rule, namely that which requires the plaintiff to aver in his complaint that he was a shareholder at the time of the transaction in question or thereafter received his share by operation of law.<sup>593</sup>

The problem with this analysis, as with an analysis that focuses on policy choices already made under state (or federal) law, is that such choices are, for the purposes of the Act, seemingly irrelevant.<sup>594</sup> It should make no difference whether the rights asserted in a derivative action are thought to belong exclusively to the corporation.<sup>595</sup> As an original proposition, the Act, interpreted in the light of the pre-1934 history, would require that, as between the Supreme Court exercising rulemaking power and Congress, a decision to authorize (or not authorize) derivative

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<sup>590</sup> See *supra* text accompanying note 375. In the 1948 revision, the second sentence was changed to read: "Such rules shall not abridge, enlarge or modify any substantive rights." See *supra* text accompanying note 400.

<sup>591</sup> See 2 MOORE & FRIEDMAN, *supra* note 526, at § 23.05; 7A WRIGHT & MILLER, *supra* note 41, at § 1821.

<sup>592</sup> See 28 U.S.C. § 1359 (1976).

<sup>593</sup> Although the contemporaneous ownership requirement is at times rationalized as supplementary to the anti-collusion requirement, it has also been thought to serve other purposes, such as preventing "the speculation by shareholders in corporate causes of action." 2 MOORE & FRIEDMAN, *supra* note 526, at § 23.05; see Harbecht, *supra* note 82, at 1041-42; Rowe, *supra* note 411, at 853-54. Indeed, in considering the validity of the contemporaneous ownership requirement in late 1937, Mitchell seemed to find persuasive the argument that it was valid in diversity cases, where collusion is of concern, but not in federal question cases, where it is not. See, e.g., letter from William D. Mitchell to Edgar B. Tolman (December 8, 1937), *supra* note 582.

<sup>594</sup> See *supra* text accompanying notes 494-506.

<sup>595</sup> In fact, there was uncertainty about the nature of the rights asserted in derivative actions. Compare 2 MOORE & FRIEDMAN, *supra* note 526, § 23.05, at 2253-63 (drawing a bright line) with H. BALLANTINE & N. LATTIN, CASES AND MATERIALS ON THE LAW OF CORPORATIONS 832-33 (1939) (arguing for a "double aspect") [hereinafter cited as BALLANTINE & LATTIN].

actions be made by the latter.<sup>596</sup> Similar reasoning leads to the conclusion that choices with respect to regulations having a predictable and identifiable effect on such a derivative claim are for Congress. The contemporaneous ownership requirement in Rule 23(b) appears to be of that type.<sup>597</sup>

In this light, the dictum in *Cohen*, suggesting the applicability and validity of the contemporaneous ownership requirement in Rule 23(b), can be supported only on the ground that the requirement was not only not inconsistent with, but also not additional to, the requirements of the relevant state law.<sup>598</sup> For whatever

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<sup>596</sup> Taking account of "more practical considerations" as recommended by BALLANTINE & LATTIN, *supra* note 595, at 833, it is apparent that, even viewed from the perspective of the corporation's rights under the substantive law, the derivative action is responsive to a perception that in some circumstances those rights will not be enforced by the officers and directors for reasons that have nothing to do with sound management policy. See *Meyer v. Fleming*, 327 U.S. 161, 167 (1946). In part, then, the remedy is calculated to, and will predictably, have an identifiable effect on those rights. Moreover, to the extent a derivative action does have a "double aspect," so that the shareholder can be seen as bringing "an action for specific enforcement of the obligation owed by the corporation to the shareholder to assert its rights of action," BALLANTINE & LATTIN, *supra* note 595, at 833, its creation and definition are indistinguishable from the creation and definition of rules of substantive law. Finally, it should be noted that Rule 23(b) was not entirely incorporative, since it broadened the action to include shareholders in unincorporated associations. See 2 MOORE & FRIEDMAN, *supra* note 526, § 23.05, at 2247; 7A WRIGHT & MILLER, *supra* note 41, § 1821.

<sup>597</sup> See *supra* note 596. Viewed from the perspective of the corporation, a choice with respect to such a requirement affects the likelihood that its rights will be enforced by defining the universe of those who are permitted to assert them. That this is not a fanciful problem is suggested by the laws of those states which permit a court, in its discretion, to waive the contemporaneous ownership requirement. See Harbrecht, *supra* note 82, at 1043 n.10; see also *id.* 1063; 3B MOORE, *supra* note 41, § 23.1.15[2], at 23.1-23. Viewed from the perspective of the shareholder, the choice defines his or her rights. Cf. Harbrecht, *supra* note 82, at 1049-50. Professor Harbrecht's analysis is, however, based on the interpretation of the Act advanced by Professor Ely. See Ely, *supra* note 3, at 718-40; see also McCoid, *Hanna v. Plumer, The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 908 n.114 (1965). Under either interpretation, it may be thought to make a difference whether dismissal for failure to comply with the Federal Rule leaves the plaintiff free to sue in state court, a matter as to which there is considerable doubt. See Harbrecht, *supra* note 82, at 1049-50; 7A WRIGHT & MILLER, *supra* note 41, § 1829, at 360-63.

<sup>598</sup> The New Jersey statute imposed substantially the same requirement as to contemporaneous ownership. 337 U.S. at 544-45 n.1. That, however, does not preclude differences in interpretation. See Harbrecht, *supra* note 82, at 1046, 1050-51. The decision might also be supported if the fact that a matter was treated in an Equity Rule were considered dispositive of validity under the Act. See *infra* text accompanying notes 641-59. Note, however, that in this case, the Equity Rule may have been adopted on the incorporation principle. See *supra* notes 582 & 584.

Since *Cohen*, the Court has indicated that it "has never resolved the issue" whether the contemporaneous ownership requirement in Rule 23(b), now FED. R. CIV. P. 23.1, could "be validly applied in federal diversity cases where state law permitted a noncontemporaneous shareholder to maintain a derivative action." *Bangor Punta Operations, Inc. v. Bangor & A.R.R. Co.*, 417 U.S. 703, 708 n.4 (1974). As in *Cohen*, and notwithstanding *Hanna*, it seems not to have occurred

scope may be given to the incorporation principle when a Federal Rule incorporates preexisting federal law from an Act of Congress,<sup>599</sup> the relevant considerations are quite different when the law that is incorporated is found in a federal court decision. Or at least they are when state law furnishes the rule of decision.

b. *The Incorporation Principle in Federal Question Cases*

When federal law furnishes the rule of decision, it may not seem sensible to insist on a mixed regime of Federal Rules and federal common law for the conduct of litigation or, viewed from another perspective, there may be little harm in permitting incorporation in Federal Rules of preexisting rules of federal common law that, if initially proposed as Federal Rules, would have been regarded as substantive within the meaning of the Act.<sup>600</sup> Since, by hypothesis, the Court already has had the benefit of adjudicative lawmaking at least once, unless there is a substantially greater likelihood that continuation in that mode would bring to the Court's attention the need to change the governing legal standard or would expedite that process, the costs of a dual system of procedural regulation—some provisions in Federal Rules, others in federal decisions—might not justify the distinction.<sup>601</sup> The

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to the Court that a provision of the Rule should stand or fall no matter what the ground of federal jurisdiction. Compare 7A WRIGHT & MILLER, *supra* note 41, § 1829. Ironically, if one accepts incorporation (but insists on analysis of the incorporated federal common law rule), in this case the argument for validity in diversity cases may be stronger than it is in federal question cases. See *supra* note 593. But see *infra* text accompanying notes 602-05.

<sup>599</sup> See *infra* text accompanying notes 606-10.

<sup>600</sup> The discussion assumes that there is constitutional power and authority to fashion federal common law. In addition, the assumption is that the common law rule incorporated in a Federal Rule has been announced by the Supreme Court. Incorporation of rules emerging from the decisions of lower federal courts would pose considerably greater difficulty. It is also assumed that, in fashioning federal common law, the Court has given due attention to the possibility of using state law as the federal rule. See Mishkin, *supra* note 507; see also *Burks v. Lasker*, 441 U.S. 471 (1979). Finally, when used in this discussion, "federal common law" includes rules announced by federal courts sitting in equity, that is, prior to 1938.

<sup>601</sup> Prior to the Cummins bill, which added the requirement in § 2 that proposed court rules for a unified system be reported to Congress, and the decision that amendments to Federal Rules were subject to the same requirement, it could reasonably have been hoped that a Federal Rule found to be defective would be changed *more quickly* than federal common law announced by the Supreme Court. See *supra* notes 268 & 277. Notwithstanding contrary representations made to Congress on the question of amendments, see, e.g., 1938 *House Hearings*, *supra* note 435, at 67-68, and specific attention to it in the 1938 House Report, see H.R. REP. NO. 2743, 75th Cong., 3d Sess. 3-4 (1938) [hereinafter cited as 1938 *HOUSE REPORT*], Dean Clark pressed his view that submission was not necessary (although it might be made as a matter of courtesy). See, e.g., letter from Charles E. Clark



question remains, however, whether multiple sources of procedural law can be avoided in the federal courts.

*c. The Incorporation Principle in Diversity Cases: Cohen Revisited*

Where state law furnishes the rule of decision, a federal common law rule which as a Federal Rule would be substantive under the Act might also be invalid under *Erie* and its progeny.<sup>602</sup> To permit the incorporation principle to operate here diminishes the Act's potential to safeguard federalism values in general. In addition, under current interpretations of the Act, it clothes invalid exercises of federal power with a presumption of validity to which,

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to Monte M. Lemann, *supra* note 571. Clark argued that, if deemed to be required in all cases, submission would adversely affect federal procedure by retarding needed amendments and inviting congressional supervision and tinkering. In December 1939, Chairman Mitchell submitted a report to the Court noting that the Advisory Committee was of the view that amendments should be submitted to Congress, Dean Clark alone dissenting, and enclosing memoranda in support of both positions. See letter from William D. Mitchell to the Hon. Charles E. Hughes (December 21, 1939) (Clark Papers, *supra* note 529, Box 113, Folder 69). Thereafter, the Court transmitted an amendment to the Attorney General for reporting to Congress. See 308 U.S. 642-43 (1939).

In light of the 1950 amendments to the Rules Enabling Act, see *supra* note 268, and given the nature of the Court's docket, change may still come more quickly to a Federal Rule than to federal common law, at least in cases where Congress does not intervene. That seems particularly likely to be true in areas that have constitutional overtones. Such areas, however, are among the most questionable for a choice of rulemaking over adjudication. See *supra* note 515. Indeed, the propriety of fashioning broad rules affecting constitutional rights even in the context of adjudication is questionable. See, e.g., *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981); H. FRIENDLY, *supra* note 38, at 235-84.

For a time chart of recent amendments to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure, see W. BROWN, *supra* note 14, app.; see also *id.* 60-63; *infra* note 632.

It was in part the difficulties caused by diverse sources of law that led to and sustained the movement for a uniform federal procedure bill. See *supra* text accompanying note 110.

<sup>602</sup> "Diversity cases" and "cases in which state law furnishes the rule of decision" are used interchangeably, even though they are not congruent.

The impact on rights recognized by the substantive law that is of concern under the Rules Enabling Act, interpreted in light of the pre-1934 history, would usually lead to the conclusion that the application of a federal common law rule is outcome-determinative under the test proposed in *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965), and applied in *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980). Moreover, a federal common law rule creating or defining rights affecting persons or property in a manner similar to substantive law, which is also of concern under the Act, might not be outcome-determinative, but it might well lead to forum-shopping and, if the concept has any independent utility, to a perception of "inequitable administration of the laws." 380 U.S. at 468; 446 U.S. at 753; see Ely, *supra* note 3, at 714; *infra* note 682.

Obviously, this analysis is chiefly directed to the original Federal Rules of Civil Procedure, since we may rely on the Supreme Court faithfully to apply its decisions elaborating the implications of *Erie* in the context of federal common law.

as a factual matter, they are not entitled. Assume, for instance, on the facts of *Cohen*, that New Jersey law had not required ownership at the time of the transaction in question and that, as suggested above,<sup>603</sup> the contemporaneous ownership requirement in Rule 23(b) is substantive within the meaning of the Act. Although finding its original source in a decision of the Supreme Court, the requirement could not in these circumstances be imposed by federal common law today.<sup>604</sup> Whatever its other defects, the Court's interpretation of the Act in *Hanna v. Plumer* surely must be questioned when we realize that in some cases the incorporation principle, not a "prima facie judgment" by the Advisory Committee that a Federal Rule was procedural under the Act, determined the Rule's content.<sup>605</sup>

#### d. *The Incorporation Principle and Federal Statutes*

Finally, even where the federal law incorporated in a Federal Rule is contained in an Act of Congress, the technique can cause problems under the Act. For if the need arises to change the

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<sup>603</sup> See *supra* text accompanying notes 596-97.

<sup>604</sup> The Court has not decided the question. See *supra* note 598. The conclusion seems inescapable, however, after *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). See *supra* note 602; *infra* note 682.

<sup>605</sup> *Hanna*, 380 U.S. at 471. The Court included itself and Congress in the list of bodies said to have made such a judgment. In light of the Court's past approval of the incorporation principle, see *supra* text accompanying note 580, and doubts about the thoroughness of its review of proposals made by the Advisory Committee, see *W. Brown, supra* note 14, at 71-73, one may question whether, at least in situations involving this problem, its role provides a basis for the presumption. Even if the Court's reliance on the opportunity for congressional review is reasonable as a general proposition, but see *supra* text accompanying notes 395-98, it is not reasonable with respect to the original Civil Rules. See *infra* text accompanying notes 699-704.

Of course, it is not clear what sustenance the Court in *Hanna* derived from this presumption of validity, and it was more restrained in that regard than the Court in *Sibbach*. See *supra* text accompanying note 66; *infra* text accompanying notes 696-97. But see *J. Weinstein, supra* note 3, at 98 ("This is hardly the kind of neutral approach that should be expected of the Supreme Court."). Perhaps *Sibbach* will continue to be followed even when it is recognized that the incorporation principle is at work in a Federal Rule. It is also possible, however, that the Court will be driven either to reexamine *Sibbach* or, at least, to hold that it does not furnish a suitable test in the absence of a considered judgment that federal power should be asserted. Cf. *Wright, supra* note 20, at 574: "[T]he implication of *Hanna* is not that the federal rules are valid because wise men made them, but because wise men thought carefully before making them. Careful thought to the presuppositions of federalism seems to me now essential in the formulation of federal rules."

As pointed out *supra* note 598, a contemporaneous ownership requirement is *easiest* to defend in diversity cases. However, it is doubtful that *Hanna's* dictum, applied in *Walker*, permits the consideration of federal interests that would be necessary to sustain a federal common law rule imposing such a requirement. See, e.g., *Ely, supra* note 3, at 707-18; *Redish & Phillips, supra* note 75, at 367-72.

Rule, there is doubt whether change can be effected by the rule-makers or must be made, if at all, by Congress. When confronted with this problem in connection with Federal Rule of Civil Procedure 25, regulating the substitution of parties, the Advisory Committee and the Court twice resolved the doubt in favor of power to amend by court rule.<sup>606</sup> In doing so, they failed to recognize that rulemaking with respect to abatement of actions seems to be excluded from the Act's grant of authority by the pre-1934 history.<sup>607</sup> In addition, the Reporter placed considerable emphasis on the fact that the original provisions in Rule 25 were derived from statutes.<sup>608</sup> Justice Douglas specifically dis-

<sup>606</sup> In 1961, the Court amended Rule 25(d), which deals with substitution of successor public officers as parties to actions. See 368 U.S. 1009, 1015 (1961). In 1963, the Court amended Rule 25(a), which deals with substitution of private parties upon their death. See 374 U.S. 863, 882-83 (1963). The former is discussed in Kaplan, *1961-1963 Amendments (I)*, *supra* note 435, at 604-11. The latter is discussed in Kaplan, *1961-1963 Amendments (II)*, *supra* note 435, at 806-11. See also *id.* 834-38.

<sup>607</sup> See *supra* text accompanying notes 486-87 & 514-15. The pre-1934 history more clearly presents a problem for Rule 25(d), which itself determines survival of the action. See *infra* note 608. Rule 25(a), on the other hand, looks to federal or state law on that question, and prescribes time limits for a motion for substitution. It should be noted, however, that both matters were treated as substantive in the 1915 New York Report. See 3 1915 NEW YORK REPORT, *supra* note 175, at 19, 479; cf. 1 *id.* 96 (general court rules as to substitution).

With reference to original Rule 25(a)(1), which required substitution within two years, it is true in one sense that a Federal Rule with respect to substitution deals with "an incident of an already existing action." Kaplan, *1961-1963 Amendments (II)*, *supra* note 435, at 810. That may not be determinative under the Act, as the pre-1934 history with respect to provisional and final remedies indicates. See *supra* text accompanying notes 487 & 512-13. Moreover, upon the death of a party, it is admittedly a question of substantive law whether the action continues to exist. At that moment, from the perspective both of the party to be substituted and of the party seeking substitution, an inflexible time limit in such a Rule looks, formally and functionally, like a statute of limitations. Because it was interpreted as inflexible, see *Anderson v. Yungkau*, 329 U.S. 482 (1947), and because parties often lacked the information necessary to protect themselves from its operation, original Rule 25(a)(1) was not, as Professor Kaplan asserted, "comparable to other limitations of time appearing in the rules such as the usual thirty-day provision for giving notice of an appeal." Kaplan, *1961-1963 Amendments (II)*, *supra* note 435, at 810; see 3B MOORE, *supra* note 41, § 25.06[1]-[2]; see also Clinton, *supra* note 13, at 60. But see 70 HARV. L. REV. 1471, 1474 (1957). A choice among time limits of that sort would have a predictable and identifiable effect on rights recognized by the substantive law; accordingly, under the standards emerging from the pre-1934 history, it was a choice for Congress.

The 1963 amendment substantially obviated the problems of inflexibility and notice. See Kaplan, *1961-1963 Amendments (II)*, *supra* note 435, at 810-11; see also 3B MOORE, *supra* note 41, § 25.06[2]. As an original proposition, the amended Rule might be valid under the Act. However, the question of the significance to be attributed to congressional action in the area remains to be explored. See *infra* note 608.

<sup>608</sup> See Kaplan, *1961-1963 Amendments (I)*, *supra* note 435, at 604, 607; Kaplan, *1961-1963 Amendments (II)*, *supra* note 435, at 810. Professor Kaplan was the Reporter for the Advisory Committee at the time. See also 3B MOORE, *supra* note 41, § 25.09[1].

sented from one of the amendments on the ground that "any change should be left to Congress."<sup>609</sup> The other has recently posed a very difficult problem of conflict between federal and state law.<sup>610</sup>

It is doubtful that Congress's action in repealing the statute upon which original Rule 25(d) was based should be accorded dispositive significance, at least insofar as the validity under the Act of departures from the statute in the original Rule or the amendment of the Rule is concerned. Cf. Case Comment, 105 U. PA. L. REV. 1098, 1101 (1957) (Rule 25(a)(1)); 3B MOORE, *supra* note 41, § 25.01[4] (same). But see Case Comment, *supra* note 607, at 1473 (same). On the other hand, Congress's action surely must be accorded *some* significance, see *supra* note 403 and accompanying text, and in that regard it seems formalistic to invalidate a Federal Rule that tracks an Act of Congress in its substantive aspects on the ground that the statute has been repealed, at least where repeal was itself premised on supersession of the statute by the Federal Rule. Cf. *Iovino v. Waterson*, 274 F.2d 41, 46 (2d Cir. 1959) (Rule 25(a)(1)), *cert. denied*, 362 U.S. 949 (1960). But cf. *Perry v. Allen*, 239 F.2d 107 (5th Cir. 1955) (same).

When, however, a Rule incorporates a substantive congressional policy choice, the pre-1934 history of the Act suggests that any amendment, including an amendment that as an original proposition would be within the Court's power, should be made by Congress. Thus, passing the validity of the departures in original Rule 25(d), see 3B MOORE, *supra* note 41, § 25.09[1], when Congress has imposed a limitations period on revivor, it is not for the Court to eliminate it. But that may not be a just ground for criticism of amended Rule 25(d), because dismissal under the original Rule for failure to comply with the six-months provision was without prejudice to the commencement of a new action. See *Snyder v. Buck*, 340 U.S. 15 (1950); 3B MOORE, *supra* note 41, § 25.09[1]. On the other hand, the original Rule, tracking the statute, required the party seeking substitution to make a satisfactory showing "to the court that there is a substantial need for so continuing and maintaining [the action]." *Id.* § 25.01[7]. The 1961 amendment eliminated this requirement. *Id.* § 25.09[1]. Justice Douglas dissented from the amendment, focusing—with good reason, it would appear—on this aspect. See 368 U.S. 1009, 1012-14 (1961) (dissenting statement of Douglas, J.). It is not apparent why the fact that Congress acted in 1898 and 1922 on the Court's recommendations is relevant. But see Kaplan, 1961-1963 *Amendments* (I), *supra* note 435, at 607; 3B MOORE, *supra* note 41, § 25.09[3], at 25-105. And reliance on the fact that "the matter had already been dealt with by a rule superseding a statute," Kaplan, 1961-1963 *Amendments* (I), *supra* note 435, at 607, is a bootstrap operation. Congressional interest in substitution may not be "intense," *id.*, but where Congress has spoken on a matter that is substantive under the Act, it hardly suffices to note that "[t]o improve the rule by amending it in the usual way rather than by seeking direct legislation does not seem an extravagant use of rulemaking power." *Id.* (footnote omitted). Many choices that will have a predictable and identifiable effect on rights recognized by the substantive law (e.g., limitation periods) are essentially arbitrary. A Federal Rule that eschews such choices in a legislative vacuum will be valid. But original Rule 25(d) was not, and could not have been, promulgated in a legislative vacuum.

On this analysis, the 1963 amendment to Rule 25(a)(1) also seems of doubtful validity if the Act is reinterpreted in light of the pre-1934 history. The two-year provision in the original Rule tracked a statute. Equity Rule 45, which was also cited by the Advisory Committee, contained no time limit. 3B MOORE, *supra* note 41, § 25.01[4]. Since such a limitations period appears to be substantive under the Act, the Court should have no greater power to vary it than it would to prescribe it in the first place. The incorporation principle may be convenient, but it is not, and was never intended to be, a license.

<sup>609</sup> 368 U.S. 1009, 1014 (1961) (dissenting statement of Douglas, J.) (Rule 25(d)); see *supra* note 608.

<sup>610</sup> See *Boggs v. Blue Diamond Coal Co.*, 497 F. Supp. 1105 (E.D. Ky. 1980) (Rule 25(a)).

### 5. Tolling Statutes of Limitations and the Problem of Reverse Incorporation<sup>611</sup>

Somewhat similar questions are raised in connection with another problem of power that was identified by the Advisory Committee in the drafting process—the use of Rule 3 to toll federal or state statutes of limitations. The Court has considered this problem in the context of state statutes applicable in diversity actions where, when the Act is reinterpreted in light of the pre-1934 history, its proper solution is clear. It has yet to resolve the problem where federal law furnishes the rule of decision, a context in which it is more challenging, if only because it raises questions that the Court's preoccupation with federalism has obscured.

Having opted, albeit with some reluctance, for a Federal Rule providing that a "civil action is commenced by filing a complaint with the court" in the April 1937 Report,<sup>612</sup> the Advisory Committee mentioned in the Note the question whether compliance with the Rule's terms should be interpreted as tolling the relevant federal or state statute of limitations.<sup>613</sup> In its Note to the Rule as promulgated, the Advisory Committee restated the question and added the observation that the answer might depend on the power of the Supreme Court "to vary statutes of limitations."<sup>614</sup> It also observed that the provisions of Rule 4(a), requiring the clerk, upon filing of the complaint, to issue and deliver a summons for service "forthwith," would "reduce the chances of such a question arising."<sup>615</sup>

The Advisory Committee was a poor prophet. The question it foresaw with respect to state statutes of limitations has twice been ruled upon by the Supreme Court. In *Ragan v. Merchants Transfer & Warehouse Co.*,<sup>616</sup> the Court held that filing a complaint in accordance with Rule 3 did not toll the period of a state statute of limitations requiring service of summons for that purpose. In *Walker v. Armco Steel Corp.*,<sup>617</sup> the Court adhered

<sup>611</sup> "Reverse incorporation" refers to the use of a Federal Rule in its substantive aspects as federal common law.

<sup>612</sup> *April 1937 Report*, *supra* note 547, at 4; *see id.* 5-6.

<sup>613</sup> *See id.* 4-5. This Note was apparently formulated after the May and August correspondence discussed *infra* note 620. *See* letter from Edgar B. Tolman to Charles E. Clark (February 8, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 60). As used in this discussion, the word "tolling" refers only to the suspension of a limitations period in connection with the commencement of litigation.

<sup>614</sup> *Advisory Committee Notes*, *supra* note 561, at 3-4.

<sup>615</sup> *Id.* 4. Chairman Mitchell suggested the provision. *See infra* note 633.

<sup>616</sup> 337 U.S. 530 (1949).

<sup>617</sup> 446 U.S. 740 (1980).

to that view in the face of argument by the petitioner, some lower court opinions, and academic commentary to the effect that *Ragan* had been overruled by *Hanna*.<sup>618</sup>

*Hanna's* gloss on *Ragan*, viewing the latter as an interpretation of Rule 3 rather than of *Erie* and its progeny, is difficult to support,<sup>619</sup> and the interpretation of Rule 3 in the gloss is not as persuasive as the reference in *Walker* to the Advisory Committee's Note suggests.<sup>620</sup> In any event, the opinion in *Walker* was not

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<sup>618</sup> See, e.g., C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 59, at 277 (3d ed. 1976).

<sup>619</sup> Compare *Ragan*, 337 U.S. at 533 with *Hanna*, 380 U.S. at 470. Such a comparison makes it difficult to credit the Court's statement that the holding in *Ragan* "was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." *Hanna*, 380 U.S. at 470; see also J. WEINSTEIN, *supra* note 3, at 191 n.363.

<sup>620</sup> This Note establishes that the Advisory Committee predicted the problem which arose in *Ragan* and arises again in the instant case. It does not indicate, however, that Rule 3 was intended to serve as a tolling provision for statute of limitation purposes; it only suggests that the Advisory Committee thought the Rule *might* have that effect.

446 U.S. at 750 n.10.

In fact, it is possible to infer from the published sources that the Advisory Committee intended Rule 3 to have a tolling effect, if that were within the Court's power under the Act. See 1938 *House Hearings*, *supra* note 435, at 74: "I suppose that if there is neither a State nor a Federal statute which defines what constitutes commencement of the action within the meaning of the particular statute of limitations in question, it is pretty clear that this rule governs." (statement of E.B. Tolman). See also Mitchell, *supra* note 547, at 967. In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444 (1946), the Court indicated that the views of "authorized spokesmen" for the Advisory Committee deserve weight in ascertaining the meaning of Federal Rules.

The Advisory Committee's papers reveal a vigorous debate between Chairman Mitchell and Dean Clark on the proper interpretation of Rule 3. Mitchell doubted that the Act authorized a Rule having the effect of tolling a state or federal statute of limitations, a matter he believed was to be settled by construction of the statute involved, and he was concerned that, unless proper warning were given in the Notes, the bar would be misled. See, e.g., letters from William D. Mitchell to Charles E. Clark (May 14, 17, 18 & 19, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 57). Clark thought that such a Rule was valid and would control except as against statutes that had been interpreted to require service of process, and he resisted Mitchell's suggested Note. See, e.g., letters from Charles E. Clark to William D. Mitchell (May 17, 18, 18 & 18, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 57). In August 1937, Tolman sent to the members of the Advisory Committee two memoranda, one prepared by Joseph Friedman and forwarded by Dean Clark and one by Tolman himself, on Rule 3 and statutes of limitations. Tolman, Memorandum to the Members of the Advisory Committee (August 12, 1937) (8 Communications of the Advisory Committee, *supra* note 529; Clark Papers, *supra* note 529, Box 107, Folder 39). Both memoranda are noteworthy for the confusion evinced by their authors about the Act's procedure/substance dichotomy. In his discussion, for instance, Friedman suggested the relevance not only of prior classifications as between the Rules of Decision Act and the Conformity Act but also of conflict of laws decisions. See Friedman, Effect of Rule 3 upon Statutes of Limitations (August 12, 1937) (8 Communications of the Advisory Committee, *supra*

confined to the conclusions that Rule 3 "does not affect state statutes of limitations"<sup>621</sup> and that state law was applicable under the modified outcome-determination test of *Hanna*, invoked because there was no pertinent Federal Rule.<sup>622</sup> The opinion went on to elaborate the first of those conclusions with an analysis of the policies underlying the state statute of limitations.<sup>623</sup> Such an analysis is irrelevant under the Act if it is interpreted in light of the pre-1934 history. That history suggests, at the least, a prohibition against Federal Rules that have an effect on rights recognized by the substantive law that is predictable and identifiable.<sup>624</sup> No matter what policies animate it, a tolling rule is of that sort, because the choice of the event that will toll the statute necessarily defines or limits the subsistence of a claim under the substantive law.<sup>625</sup>

The more interesting question raised by *Ragan* and *Walker* is whether Rule 3 can be used to toll the applicable limitations period in cases where federal law furnishes the rule of decision. The Court so suggested in *Ragan*.<sup>626</sup> The question was noted but not addressed in *Walker*.<sup>627</sup> The Advisory Committee acknowledged that there might be a problem in some such cases, but the problem it recognized, potential conflict with a contrary provision

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note 529; Clark Papers, *supra* note 529, Box 107, Folder 39). Clark himself relied on conflicts decisions in arguing to Mitchell that statutes of limitations were procedural, and it was for Mitchell to remind Clark of the lesson taught by the latter's colleague, Walter Wheeler Cook. See letters from Charles E. Clark to William D. Mitchell (May 18, 1937), *supra*; letter from William D. Mitchell to Charles E. Clark (May 19, 1937), *supra*; see also Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333 (1933).

The debate continued into 1938, and the Note to Rule 3 was a compromise. See letter from William D. Mitchell to Edgar B. Tolman (February 7, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 60); letter from Edgar B. Tolman to William D. Mitchell (February 8, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 60); letters from Edgar B. Tolman to Charles E. Clark (February 8 & 10, 1938) (Clark Papers, *supra* note 529, Box 111, Folder 60).

<sup>621</sup> 446 U.S. at 751.

<sup>622</sup> See *id.* 752-53.

<sup>623</sup> See *id.* 751-52. Even on its own terms, the Court's analysis seems to have sown confusion. See *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 580-81 (9th Cir. 1981).

<sup>624</sup> See *supra* text accompanying notes 514-19.

<sup>625</sup> It is in that sense, not because of the policies it may be thought to reflect, that a tolling rule is an "integral" part of a statute of limitations for purposes of the Act, interpreted in light of the pre-1934 history. Compare the treatment of integrality in *Walker*, 446 U.S. at 751-52.

<sup>626</sup> See 337 U.S. at 533 (footnote omitted), citing and distinguishing *Bomar v. Keyes*, 162 F.2d 136, 141 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947), as a case "to enforce rights under a federal statute."

<sup>627</sup> See 446 U.S. at 751 n.11.

in a federal statute of limitations,<sup>628</sup> seems not to be one that is relevant under the Act. By the terms of the Act a valid Federal Rule supersedes inconsistent federal statutory provisions. Conversely, a Federal Rule invalid under the Act is not rendered valid because it tracks existing statutory law, except to the extent the incorporation principle is given effect. Reading a tolling function into Rule 3 violates the Act, interpreted in the light of the pre-1934 history, no matter what the basis of federal jurisdiction or what the source of the rule of decision.<sup>629</sup> The only situation in which that might reasonably be done is where Congress had not provided a governing rule, and it would involve what might be called reverse incorporation.

In connection with the incorporation principle, the suggestion was made that where a Federal Rule incorporates preexisting federal common law and the validity of the Federal Rule is considered only with reference to cases in which federal law furnishes the rule of decision, there is room for disagreement whether the scheme of allocation revealed by the pre-1934 history of the Act, even if generally accepted, should be strictly enforced.<sup>630</sup> The rulemakers had the benefit of at least one Supreme Court deci-

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<sup>628</sup> See *supra* text accompanying notes 613-14; *supra* note 620. Professor Ely ignored this aspect. See Ely, *supra* note 3, at 730 n.202.

<sup>629</sup> See *supra* text accompanying note 625. It should be recalled that the Advisory Committee Note to Rule 3 was a product of compromise. See *supra* note 620. The problem noted by the Committee suggests heavy reliance on the incorporation principle or an analysis that treated limitations periods as substantive law and inquired whether a Federal Rule read to provide ancillary provisions would have a proscribed effect on the right conferred thereby. Mr. Mitchell observed:

The Committee concluded that statutes of limitation are matters of substantive law and not procedure, but there is a question, a legal question, that arises, whether the Supreme Court, under the power to make rules of procedure, may make a rule defining what constitutes the beginning of a suit within the meaning of a state or federal statute of limitation.

CLEVELAND INSTITUTE, *supra* note 433, at 183. However, he went on to discuss the problem in terms of a conflicting provision in a state statute. See *id.*; cf. Joint Council Dining Car Employees, Local 370 v. Delaware, L. & W. R. Co., 157 F.2d 417, 420 (2d Cir. 1946) (Clark, J.) (Rule 6(a)). Note also the personal suggestion made by Dean Clark:

If there were a state statute of limitation which covered the question so thoroughly, which said, for example, that an action shall be barred unless summons is served within six years, I don't think that this would have any effect at all, because it doesn't cover the same ground. But if, as so often happens, the statute is phrased in terms only of commencement of action, the action must be commenced within six years from the date of the occurrence, then it seems to me that the state statutes in effect refer the matter back to the procedural question of when the suit is commenced, and that then you have to look to the procedure of the forum to see when the action is commenced, and then this rule would apply.

CLEVELAND INSTITUTE, *supra* note 433, at 203.

<sup>630</sup> See *supra* text accompanying notes 600-01.



sion<sup>631</sup> on the matter that was informed by a factual record and by the arguments of the parties. For that reason, and with the other data available in the rulemaking process, the choices to be made in the proposed Rule and the impact of alternative choices in the universe of cases to which it would apply may have been fully and fairly canvassed.<sup>632</sup>

The use of Rule 3 to toll the relevant statute of limitations in a case where federal law furnishes the rule of decision is another matter. There is no evidence that the rulemakers relied on a Supreme Court decision in which filing was determined to be the appropriate tolling event.<sup>633</sup> In addition, it is doubtful

<sup>631</sup> See *supra* note 600.

<sup>632</sup> But see Landers, *supra* note 31, at 854-55 n.43. Moreover, in a system that relies on precedent even in matters having a procedural aspect, it is not clear that where a common law rule announced by the Supreme Court is found to be wanting, it will be changed more quickly than a Federal Rule. Among the mainstays of the ABA's campaign, and of the national campaign, for regulation of procedure by rules of court were the arguments that the parties have no legitimate stake in rules of procedure (so long as the court has discretion to protect them from actual prejudice) and that legislative regulation deprives the courts of the ability to recognize and right injustice where it occurs. Tied to these was the notion that rules of court which prove to be unsatisfactory can be amended immediately. See, e.g., *Report of the Committee on Uniform Judicial Procedure*, 6 A.B.A. J. 509, 513, 516-17 (1920); *supra* notes 268, 277 & 601; Sunderland, *supra* note 330, at 302-04, 307-12; Paul, *The Judicial Council and Reform of Judicial Procedure*, 5 OR. L. REV. 1, 7-8 (1925). Compare *Peoria, D. & E. Ry. Co. v. Rice*, 144 Ill. 227, 232, 33 N.E. 951, 953 (1893), in which the court, speaking of common law rules, said: "Rules of practice must be laid down, not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice."

Recently, Professor Ely has suggested, in defending the refusal of the Court in *Hanna* to cast doubt on *Ragan*, that "much of the point of a set of procedural rules is to let people get used to and rely on the routine of doing things in a certain way." Ely, *supra* note 3, at 730. The same view was apparently taken by the Court in *Walker*. See 446 U.S. at 749. Although both discussions involved the interpretation of a Federal Rule, they may indicate a more general attitude that includes federal common law rules.

The practice of reporting amendments of Federal Rules to Congress substantially vitiated the objective of speed that had animated the ABA sponsors of the uniform federal procedure bill, but particularly in the absence of congressional interference, and given the Court's docket, that process seems likely to secure change as quickly as or more quickly than case-by-case adjudication by the Supreme Court. See *supra* note 601.

<sup>633</sup> There were cases in which federal courts sitting in equity applied a federal tolling rule for federal statutes of limitations. See, e.g., *Linn & Lane Timber Co. v. United States*, 236 U.S. 574, 578 (1915). Moreover, Professor Moore asserted that the same was true where federal courts sitting in equity applied "state statutes of limitation by way of analogy." 1 MOORE & FRIEDMAN, *supra* note 526, § 3.06, at 246. However, his citations provided very weak support for that view. See cases cited *id.* 246 n.18, 243 n.8; see also Blume & George, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 943-46 (1951). In any event, the tolling rule emerging from these cases—"filing of complaint and issuance of summons to an

that there could be one decision that would persuasively lay down a broad governing rule on the subject. Whenever federal law furnishes the rule of decision and there is no controlling statutory provision, and particularly when limitations are at issue, the possibility exists that state law will be borrowed to serve as the federal law.<sup>634</sup> Sensitive exercise of the power to fashion federal common law requires attention both to the federal legal context in which the rule will fit and to the possibility that piecemeal borrowing may distort the state scheme from which a selection is made.<sup>635</sup> Of course, the Supreme Court may determine after an appropriate analysis that filing is the appropriate event for tolling an applicable statutory period, federal or state, and it may even do so categorically.<sup>636</sup> But in that case not even the argument from convenience justifies reference to Rule 3 as the source of the common law rule.

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officer with bona fide intent that it be served," 1 MOORE & FRIEDMAN, *supra* note 526, § 3.06, at 246—is not incorporated in Rule 3, or even in Rules 3 and 4, and there is no mention of it in the Advisory Committee's published drafts or Notes. In fact, one of the grounds upon which Mitchell objected to Clark's interpretation of Rule 3 was its inconsistency with the view of the Committee at the time when it was purporting to deal with the question of tolling, that is, before it determined that the matter was beyond the authority conferred by the Act. See letter from William D. Mitchell to Charles E. Clark (May 17, 1937), *supra* note 620. Later, Mitchell suggested an amendment to Rule 4 that he believed would come close to solving the problem. See letter from William D. Mitchell to Charles E. Clark (August 16, 1937) (Clark Papers, *supra* note 529, Box 111, Folder 58); *supra* text accompanying note 615.

<sup>634</sup> See, e.g., *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *Johnson v. REA*, 421 U.S. 454 (1975); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); see also Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitation*, 65 CORNELL L. REV. 1011 (1980). See generally Mishkin, *supra* note 507.

<sup>635</sup> See, e.g., *Johnson v. REA*, 421 U.S. 454, 463-64 (1975); see also *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701-08 (1966).

<sup>636</sup> Cf. *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 40-41 (1949) (concluding that "the considerations of liberality and leniency which find expression in Rule 6(a) are equally applicable to 28 U.S.C. § 2101(c)"); 2 MOORE, *supra* note 41, at ¶¶ 6.06[1]-[2] (Rule 6(a)). It is not clear whether there should be more than one category. See Note, *Commencement Rules and Tolling Statutes of Limitations in Federal Court: Walker v. Armco Steel Corp.*, 66 CORNELL L. REV. 842, 854-59 (1981). Certainly, the Court's perception in *Walker* that the state tolling rule there involved was an "integral part" of the statute of limitations suggests caution in fashioning a uniform federal common law rule for all cases, including those in which a state limitations period is borrowed. *Id.* 858; see *Johnson v. REA*, 421 U.S. 454, 463-64 (1975).

Compare an analysis of this type with that in the cases that have used Rule 3 to toll the limitations period where federal law furnished the rule of decision. See, e.g., *United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978); *Bomar v. Keyes*, 162 F.2d 136 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947).

C. *Specific Problems of Power That Were Not Noted by the Original Advisory Committee: Hanna and Sibbach Revisited*

The original Advisory Committee identified other questions of rulemaking power during the drafting process.<sup>637</sup> In concluding this analysis of the Committee's work and the implications of the limitations suggested by the pre-1934 history of the Rules Enabling Act, however, it may be more useful to examine two instances in which the Committee did not specifically acknowledge such questions and in which the Supreme Court has sustained the validity of Federal Rules. This discussion takes us back to *Hanna* and *Sibbach*, the recent and original foundations of the Court's interpretation of the Act.

1. Service of Process: *Hanna*

There is no indication in any of the Advisory Committee's published drafts or in the unpublished papers reviewed for this article that the method proposed for service of the summons and complaint on an individual in Rule 4 was thought to transgress the Act's restriction to Rules of "procedure."<sup>638</sup> Moreover, when presented with a challenge to the validity of the Rule under the Act and an assertion that different requirements of a state statute

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<sup>637</sup> For instance, in connection with Rule 23 on class actions, the Committee "consider[ed] it beyond their functions to deal with the question of the effect of judgments on persons who are not parties. No attempt has been made to state the effect of the judgments upon members of a class who have not been specifically named as parties to the action." *April 1937 Report, supra* note 547, at 60. Professor Moore had proposed that the matter be covered. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 570-76 (1937). The Advisory Committee rejected the proposal "due to the feeling that such a matter was one of substance and not of procedure." Moore & Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938); see February 1937 Transcript, *supra* note 569. For a further discussion of this problem, see Ross, *Rule 23(b) Class Actions—A Matter of "Practice and Procedure" or "Substantive Right"?*, 27 EMORY L.J. 247 (1978); Fyr, *On Classifying Class Suits: A Reply to Mr. Ross*, 27 EMORY L.J. 267 (1978).

<sup>638</sup> Original Rule 4(d)(1) provided:

(d) Summons: Personal Service. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

The Rule has not been amended.

applied, the Court in *Hanna* dismissed the former with dispatch.<sup>639</sup> The issue has been deemed considerably more difficult by commentators who read into the Act congressional intent to protect substantive state policies.<sup>640</sup> It is more difficult, but not for the reasons those commentators have suggested.

a. *A Special Problem of Incorporation: The Supreme Court's Equity Rules*

At the 1924 Senate Hearing, Senator Cummins asked the witnesses testifying in favor of his bill:

And what do you say in regard to another phase of it? You bring a suit, and there are several defendants; there may be more than one defendant; some of them may be non-residents of the district or of the state in which the suit is brought. Would this give the Supreme Court the power to say how those defendants should be notified?<sup>641</sup>

Although hesitating to answer, Justice Sutherland confined the Court to "fix[ing] the form of [notice]." When asked specifically whether the bill would authorize the Court to prescribe notice in some manner other than publication in states where that was permitted, Sutherland replied, "I would not think so." Both Justice McReynolds and Justice Van Devanter followed with references to the treatment of notice under the Equity Rules, the former opining that the bill conferred no more authority than had been exercised in the Equity Rules, and the latter stating his understanding of the practice thereunder with respect to nonresident defendants.<sup>642</sup>

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<sup>639</sup> See 380 U.S. at 464; *supra* text accompanying note 77.

<sup>640</sup> See Ely, *supra* note 3, at 732-33; Chayes, *supra* note 82, at 751-52; Ely, *supra* note 82, at 759-62.

<sup>641</sup> 1924 Senate Hearing, *supra* note 269, at 62; see *supra* text accompanying note 275.

<sup>642</sup> 1924 Senate Hearing, *supra* note 269, at 62. Justice Van Devanter stated: What we have just read from the statute is very broad in respect of the making of equity and admiralty rules, and I do not believe—without intending to now be exceedingly accurate, because I have not recently looked it up, although I assisted in making the equity rules that are now prevailing, and also the admiralty rules—but I do not believe that the court has ever construed that section that now exists as going so far as suggested that some think that maybe this might go, and I understand that the way in which in equity we bring in parties who live in other jurisdictions is according to modes prescribed by statute and not dealt with in the rules, and that the court has always dealt with that as a question to be regulated by Congress or by statutes and not as a matter to be regulated by rules.

To the extent that Senator Cummins' concern about the power to make court rules specifying the manner of giving notice comprehended both resident and non-resident defendants,<sup>643</sup> the participants in this exchange were talking past each other. Equity Rule 13, which was cited in the Advisory Committee Note to Rule 4(d),<sup>644</sup> provided for service of the subpoena "by delivering a copy thereof to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family."<sup>645</sup> Thus, a more plausible reading of Cummins' questions and of the Justices' responses would confine his concern to "notice" to non-residents.<sup>646</sup>

The distinction between notice to resident and non-resident defendants suggested by the 1924 Senate Hearing was involved in *Insurance Co. v. Bangs*,<sup>647</sup> a case cited by the Court in *Hanna* in support of its conclusion that Rule 4(d)(1) "relate[d] to the 'practice and procedure of the district courts'" within the meaning of the Act.<sup>648</sup> In that case, the question was whether a federal court had jurisdiction over a non-resident infant in a suit on a contract where service was made on the infant's general guardian after the infant had left the State. In holding that it did not, the Court noted that the law might be otherwise in the state courts. But it continued:

the State law cannot determine for the Federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties allowed in some States in purely personal actions is not permitted in the Federal courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the

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<sup>643</sup> Support for this view comes from Cummins' description of the objection "that this might give the Supreme Court the authority to make rules for the execution of its writs, say the execution of the writ of scire facias, and prescribe the notice that should be given, and how it should be given, and the property upon which it could be levied," a view Cummins did not share. *Id.* 61 (emphasis added).

<sup>644</sup> See *Advisory Committee Notes, supra* note 561, at 5.

<sup>645</sup> 226 U.S. 627, 652 (1912).

<sup>646</sup> "Notice" in this sense includes the assertion of territorial jurisdiction. Indeed, at the time the Supreme Court had still not fully sorted out the two problems in the context of state court litigation. See generally Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 272-81. On the special problem of the territorial jurisdiction of the federal courts, see *infra* note 673.

<sup>647</sup> 103 U.S. 435 (1880).

<sup>648</sup> 380 U.S. at 464. *Bangs* was introduced by the signal "Cf."

court will then only affect property of the party within the district. Rev. Stat., sect. 738.<sup>649</sup>

The authority for that proposition, a federal statute, was also said to require personal service or voluntary appearance in an action on a contract.<sup>650</sup> The Court incidentally observed, however, that the Equity Rules "qualifie[d] the statute" in two respects, including by allowing "a copy to be left at the dwelling-house, or usual place of abode of the defendant, with some person who is a member of or a resident in the family."<sup>651</sup>

Of course, the fact that a matter was treated in one of the Supreme Court's Equity Rules does not establish that it is within the Act's grant of authority. Notwithstanding general representations by the ABA sponsors and congressional supporters of the uniform federal procedure bill that its purpose and effect were to give the Court the same authority to make rules of court in actions in law as it already possessed in suits in equity,<sup>652</sup> and more specific interpretive links suggested at the 1924 Senate Hearing,<sup>653</sup> the Enabling Act contains limitations, put there for a specific purpose, that may or may not reflect limitations in prior rule-making authorizations.<sup>654</sup> In addition, as the discussion of Rule 23(b) suggests, something akin to the incorporation principle was operating long before the original Advisory Committee went to

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<sup>649</sup> 103 U.S. at 439.

<sup>650</sup> See *id.* Such apparently was the result of a negative inference from § 738. See also Rev. Stat. § 739 (1878):

Except in the cases provided in the next three sections, no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court; and except in the said cases and the case provided by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant or in which he is found at the time of serving the writ.

Compare *Arrowsmith v. U.P.I.*, 320 F.2d 219, 238 (2d Cir. 1963) (Clark, J., dissenting) with *id.* 228 n.10.

Since the Court in *Bangs* relied on a federal statute, it is not clear what support that case was thought to provide on the proposition for which it was cited in *Hanna*.

<sup>651</sup> 103 U.S. at 439-40. If the Equity Rules had prescribed notice in a manner inconsistent with the statute, they might have been invalid under Rev. Stat. § 917 (1878). See also *id.* § 913; *supra* note 161. However, both § 738 and § 739 referred to a defendant who was an inhabitant of or found within the district (the former referring also to a defendant who voluntarily appeared). Thus, neither required, at least by its terms, personal service as to an inhabitant.

<sup>652</sup> See, e.g., 1926 SENATE REPORT, *supra* note 297, at 12.

<sup>653</sup> See 1924 Senate Hearing, *supra* note 269, at 61, 62.

<sup>654</sup> One obvious and important difference between the Act and the prior statutory authority for Equity Rules concerns the effect of inconsistent federal statutes. See *supra* notes 161 & 166; *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 434-35 (1932).

work,<sup>655</sup> with the result that even if the rulemaking authorizations were found to contain identical limitations, one could not safely end an inquiry under the Act by reference to the precedent of an Equity Rule. Finally, without reference to the congruence of rulemaking limitations, the possibility exists that an Equity Rule used as a model exceeded the limitations of the statute pursuant to which it was promulgated.<sup>656</sup>

Notwithstanding these caveats, one should not lightly assume that the Enabling Act forecloses rulemaking in a merged system with respect to matters that had been treated by the Supreme Court in its Equity Rules. For quite apart from the implications of an analysis that is required to probe all of the potential discontinuities adumbrated above—implications that are horrifying when one considers the extensive borrowings from the Equity Rules by the original Advisory Committee<sup>657</sup>—it is clear that the congressional committees and subcommittees considering the Cummins bill simply did not pay much attention to section 2.<sup>658</sup> Their attention was focused on section 1, and they therefore had in mind a new system of court rules being constructed, for actions at law, where none had existed before. Moreover, although it would not be fair to read into the Act a purpose, as it were, to grandfather all Equity Rules imported into a merged system, section 2's authorization to "unite the general rules prescribed by it for cases in equity with those at actions at law"<sup>659</sup> perhaps should be read to reflect a *prima facie* judgment that the Equity Rules satisfied the Act's limitations.

#### b. Rule 4(d)(1) and the Substantive Rights That Are Relevant Under the Act

All of this is a far cry from the analysis of Rule 4(d)(1) in *Hanna*, which, following *Sibbach*, emphasizes the difference between procedure as a process and substantive law,<sup>660</sup> or from Pro-

<sup>655</sup> See *supra* note 598.

<sup>656</sup> Cf. *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629 (1924) (admiralty rule); *Meek v. Centre County Banking Co.*, 268 U.S. 426 (1925) (general order in bankruptcy).

<sup>657</sup> "Our rules have followed and have used a great deal of the equity rules. In fact, if one dared generalize, one might, I think, say that our new procedure really consists of the equity rules of 1912, applied to *all* actions and brought down to date by such new developments as have occurred since 1912." CLEVELAND INSTITUTE, *supra* note 433, at 196 (statement of C.E. Clark).

<sup>658</sup> See *supra* notes 276, 297, 317 & 350.

<sup>659</sup> See *supra* note 375.

<sup>660</sup> See *Hanna v. Plumer*, 380 U.S. 460, 464 (1965).

fessor Ely's analysis, which, although acknowledging that the goal implicated in a particular rule respecting the manner of giving notice is "terribly important," dismisses it as irrelevant because it is a procedural goal.<sup>661</sup> The concern for substantive rights expressed in the Act, read in the light of the pre-1934 history, apparently extends to constitutional interests that are procedural in the sense that they are implicated only in the context of litigation.<sup>662</sup> Were it otherwise, the 1926 Senate Report would not have characterized matters having to do with the selection and qualification of jurors as substantive,<sup>663</sup> and no attention would have been paid in the consideration of the Criminal Rules Enabling Act to the constitutional rights of criminal defendants, which, although procedural in this sense, were nevertheless thought to be substantive for purposes of that legislation.<sup>664</sup>

<sup>661</sup> Ely, *supra* note 3, at 732-33; *see also id.* 724-25 n.171; *supra* notes 495-96. But *see* Clinton, *supra* note 13, at 60-61.

<sup>662</sup> *See supra* text accompanying notes 497, 509 & 515. The discussion in the text focuses on the concern about constitutionally recognized interests that emerges from the pre-1934 history of the Act. The more demonstrable concern regarding Federal Rules that, even if designed exclusively to advance procedural goals, have a predictable and identifiable effect on rights claimed under the substantive law, should be kept in mind. That concern is also implicated in this situation. *See infra* note 666.

<sup>663</sup> *See supra* text accompanying notes 488 & 497.

<sup>664</sup> By the Act of February 24, 1933, Pub. L. No. 72-371, 47 Stat. 904 the Supreme Court was given the power to prescribe rules of practice and procedure in criminal proceedings after verdict. In promoting legislation that would confer on the Supreme Court rulemaking power in criminal cases prior to verdict, Attorney General Cummings observed:

In making this suggestion I am not unaware of the difficulties which would be confronted in drafting the rules. For example, it is not always a simple task to distinguish between procedural details on the one hand and matters which affect substantial rights on the other. While it is difficult, in close cases, to make the necessary distinctions, and while the drafters of the rules will be faced constantly with the perplexing problems, these facts do not appear to me to be, in any sense, fatal to the project. *The same problem was faced by the Supreme Court and its advisers in connection with the preparation of the Rules of Civil Procedure.*

I have no reason to believe that the Supreme Court in framing Rules of Criminal Procedure would fail to use the same discriminating care which was exercised in the preparation of the Civil Rules. *In any event, if the Court should feel that a particular problem might better be left to legislative determination, such matters could readily be excluded.*

Cummings, *A Rounded System of Judicial Rule-Making*, 24 A.B.A. J. 513, 514 (1938) (emphasis added).

In a letter to the Chairman of the House Judiciary Committee, which was holding hearings on the bill proposed by the Department of Justice, Cummings, by then no longer Attorney General, wrote: "It must be remembered in this connection that we are dealing, not with substantive criminal law in which crimes are defined and punishments prescribed, *nor with substantive rights which are embodied in constitutional guarantees*, but rather with practice and procedure—the mechanics of a criminal trial." Letter from Homer D. Cummings to the Hon. Hatton Sumners (May 8, 1939), *reprinted in Hearings on H.R. 4587 Before Subcomm. No. 2 of the*



The interests in notice and an opportunity to be heard are recognized in the Constitution as it has been interpreted.<sup>605</sup> A choice between, for instance, personal service and service by leaving a copy of the summons and complaint at the defendant's home may affect those interests—and it would do so identifiably—but so may other choices of the same sort that are made in the Federal Rules.<sup>606</sup> Moreover, those interests arise under constitutional pro-

*House Judiciary Comm.*, 76th Cong., 1st Sess. 8-9 (1939) (emphasis added) [hereinafter cited as 1939 *House Hearings*]. Cummings' dual focus on substantive criminal law and constitutional rights was reflected in the testimony at the 1939 House Hearings. See *id.* 18. Indeed, for reasons that are understandable in the context of criminal litigation, substantive law was occasionally discussed in terms of constitutional rights. See *id.* 21; see also Cummings, *Extending the Rule-Making Power to Federal Criminal Procedure*, 22 J. AM. JUDICATURE Soc'y 151, 152-53 (1938); Hall, *Objectives of Federal Criminal Procedural Revision*, 51 YALE L.J. 723, 735-39 (1942); Vanderbilt, *Foreword, The New Federal Criminal Rules*, 51 YALE L.J. 719, 721-22 (1942). But see 1939 *House Hearings*, *supra*, at 27-29.

The bill considered by the House Judiciary Committee was reported favorably, with an amendment substituting for a provision as to effective date borrowed from § 1 of the 1934 Act, one borrowed from § 2. See H.R. REP. No. 2492, 76th Cong., 3d Sess. 1 (1940); see also S. REP. No. 1934, 76th Cong., 3d Sess. (1940). As enacted, the legislation empowered the Court "to prescribe, from time to time, rules of pleading, practice and procedure" and did not include a sentence like that in the 1934 Act proscribing the abridgement, enlargement, or modification of substantive rights. See Act of June 29, 1940, ch. 445, 54 Stat. 688. It is of interest that Congress did not insert such a provision, particularly in light of the amendment it did make. Its failure in that regard and the discussion of the procedure/substance dichotomy at the 1939 House Hearings are further evidence that the second sentence of the 1934 Act was regarded as surplusage. See *supra* text accompanying notes 424-29. Moreover, the assumption that the same limitation would apply to rule-making under the Criminal Rules Enabling Act as under the Rules Enabling Act of 1934 again calls into question the propriety of formulating that limitation by reference to considerations of federalism. See *supra* text accompanying notes 430-47.

<sup>605</sup> See, e.g., *Roller v. Holly*, 176 U.S. 398 (1900); *Grannis v. Ordean*, 234 U.S. 385 (1914); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (fourteenth amendment); see also, e.g., *Blackmer v. United States*, 284 U.S. 421 (1932) (fifth amendment).

<sup>606</sup> See, e.g., FED. R. CIV. P. 5(b) (service: how made). A similar analysis applies when Federal Rules regarding notice are considered from the perspective, made relevant by the Act's pre-1934 history, of rights claimed under the substantive law. See *supra* note 662. As to both perspectives, however, it is more difficult to distinguish problems of notice at the outset of and during litigation under the Federal Rules than problems of time limitations. See *supra* note 607. For relief from a default judgment may be available under Rule 60(b) both to a party who had no actual notice of the litigation and to a party whose default occurred during the course of the suit. See, e.g., *Rooks v. American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *United States ex rel. Kantor Bros. v. Mutual Constr. Corp.*, 3 F.R.D. 227 (E.D. Pa. 1943). See generally 11 WRIGHT & MILLER, *supra* note 41, § 2858; Project, *Relief from Default Judgments under Rule 60(b)—A Study of Federal Case Law*, 49 FORDHAM L. REV. 956 (1981). In addition, in the case of a default judgment entered in the absence of actual notice of litigation, the one-year limitation under Rule 60(b)(1) does not seem to be an insuperable barrier. See, e.g., *Tozer v. Krause Milling Co.*, 189 F.2d 242 (3d Cir. 1951); 11 WRIGHT & MILLER, *supra* note 41, § 2864; Project, *supra*, at 983-87.

The recent amendments to Rule 4 promulgated by the Court, permitting in some cases service of the summons and complaint by registered or certified mail, provide for entry of a default or of a judgment for default only if "the record con-

visions of exquisite generality that, because they speak to legal procedures, are implicated in connection with every Federal Rule, as well as every statute, prescribing methods for the conduct of litigation. One mode of accommodation would be to confine the constitutional interests relevant under the Act to those specifically enumerated in the Constitution. Such a standard provides some hope that they will be recognized as "fundamental"<sup>667</sup> by the rulemakers and, at the same time, that the entire enterprise will not founder in the lap of the due process clause.<sup>668</sup>

### c. *The Pre-1934 History Provides Specific Guidance*

In any event, the validity of Rule 4(d)(1) is supported by more than the existence of an Equity Rule covering the same territory. Although none of the statutory grants pursuant to which the Supreme Court promulgated Equity Rules referred to notice,<sup>669</sup> the Clayton bill specifically authorized the Court to prescribe "the mode and manner . . . of giving notice and serving process of all kinds."<sup>670</sup> The Sutherland bill preserved the grant with changes in language not relevant for present purposes.<sup>671</sup> When Senator Cummins redrafted the uniform federal procedure bill in 1923, he did not intend to confine the authority already conferred; on the contrary, his concern was that his bill be thought to have expanded the Court's authority beyond acceptable, or even constitutionally prescribed, limits.<sup>672</sup> The aspect of "notice" discussed

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tains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant." Amended Rule 4(d)(8) further provides: "Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person." 50 U.S.L.W. 4454 (May 4, 1982). Congress has delayed the effective date of these amendments. See *supra* note 8.

<sup>667</sup> See *supra* note 509.

<sup>668</sup> Where Federal Rules are formulated affecting specific constitutional interests, and unless they do no more than incorporate prior decisional law, there is a danger that the rulemaking process will in effect define constitutional rights. See *supra* text accompanying note 515; cf. *Colgrove v. Battin*, 413 U.S. 149 (1973) (local rule). From the point of view of the interests protected by the due process clause, however, every Federal Rule can be regarded as a statement of what is fair. That is not to say that Federal Rules that are thought to operate at, or purport to define, the margins of due process are a good idea. See, e.g., *Fed. R. Civ. P. 23(c)(2)*; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

<sup>669</sup> See *supra* notes 98, 103 & 161.

<sup>670</sup> See *supra* note 154.

<sup>671</sup> See *supra* note 228.

<sup>672</sup> See *supra* text accompanying notes 259-60.

at the 1924 Senate Hearing involved the discrete problem of the territorial jurisdiction of the federal courts.<sup>673</sup>

<sup>673</sup> See *supra* note 644 and accompanying text. In *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946), the Court sustained the validity of Rule 4(f), which authorized service of process "other than a subpoena . . . anywhere within the territorial limits of the state in which the district court is held." The Court's reasoning in this aspect of the opinion involved little more than acceptance of the Advisory Committee's interpretation of another Rule, Rule 82, providing that the Rules "shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." See *id.* 444-45. Having agreed that Rule 82's prohibition referred only to subject-matter jurisdiction, the court invoked *Sibbach* to support its conclusion that Rule 4(f) did not violate the Act. See *id.* 445-46; *supra* note 71.

Prior to the Federal Rules, and except where otherwise provided by Act of Congress, the territorial jurisdiction of the federal courts in *in personam* actions was restricted to the district of which a defendant was an inhabitant or in which he could be found. This restriction was not lightly dispensed with. See, e.g., *Robertson v. Railroad Labor Bd.*, 268 U.S. 619 (1925); see also *Ohlinger*, *supra* note 36, at 464-65. The Advisory Committee pointed out to the Court various statutes that authorized service of process outside of the district, but it also noted that some people had questioned "the power of the Court to make" the more general extension provided in Rule 4(f). *April 1937 Report*, *supra* note 547, at 14; see also *CLEVELAND INSTITUTE*, *supra* note 433, at 183-84 (statement of W.D. Mitchell), 205-06 (statement of C.E. Clark); 1 MOORE & FRIEDMAN, *supra* note 526, § 4.38.

It is a close question whether Federal Rules expanding the territorial jurisdiction of the federal courts are valid under the Act, interpreted in the light of the pre-1934 history. Certainly, the view that only subject-matter jurisdiction is beyond the reach of the Rules is not the only possible interpretation of the Act or even of Rule 82. See *Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinée*, 50 U.S.L.W. 4553, 4559 (June 1, 1982) (Powell, J., concurring in the judgment). The view carries no greater presumption of fidelity to legislative intent than any other interpretation of the Act by the Advisory Committee and the Court. Moreover, even if Federal Rules do not have a proscribed effect on "rights" recognized under the "substantive law," they are not necessarily "mere procedure, such as a court has power to prescribe." 1926 SENATE REPORT, *supra* note 297, at 9. The Chairman of the Advisory Committee regarded Rule 82 as "really surplusage, because the jurisdiction and venue are matters of substantive right and not proper pleading, practice or procedure." *CLEVELAND INSTITUTE*, *supra* note 433, at 188. And the Advisory Committee's papers reveal considerable uneasiness about rulemaking with respect to territorial jurisdiction. See, e.g., letter from Warren Olney, Jr., to the Hon. William D. Mitchell, *supra* note 530. Rule 4(f) was questioned in the Senate, prompting Mitchell to observe that if it had been omitted, there would have been little in the proposed Rules to challenge as substantive. See Mitchell, Memorandum to Members of the Advisory Committee, *supra* note 569. A memorandum prepared in response to the Senate Judiciary Committee Report favoring postponement of the proposed Rules, see *infra* text accompanying note 701, emphasized the slight effect of Rule 4(f) on existing statutes. See Memorandum on S.J. Res. 281, *supra* note 561.

Before the decision in *Murphree*, a number of district courts held Rule 4(f) invalid. See, e.g., *Carby v. Greco*, 31 F. Supp. 251 (W.D. Ky. 1940); *Melekov v. Collins*, 30 F. Supp. 159 (S.D. Cal. 1939). In 1943, the Advisory Committee considered Dean Clark's suggestion that legislation be sought to validate the Rules. Chairman Mitchell observed about Rule 4(f): "When that rule was passed, I had the gravest doubt of its validity, and I was astounded when the Court passed it. I thought they would wipe it out. I don't think they ever considered it." 1 Proceedings of the Advisory Committee on Rules for Civil Procedure 37 (May 17, 1943) (Clark Papers, *supra* note 529, Box 114, Folder 71). Mitchell predicted that when the Court considered the Rule, "they are going to say that the question of territorial jurisdiction is just as important as the subject matter jurisdiction." *Id.* Moreover,

### d. *The Real Problem in Hanna*

What, then, of the promise in the 1926 Senate Report regarding the protection of state law choices involving "substantial

in response to Dean Clark's proposal that Rule 82 be amended to refer specifically and exclusively to subject-matter jurisdiction, Mitchell stated:

I have always contended that that other rule [Rule 4(f)] is a real extension of jurisdiction—maybe jurisdiction of the person and not of the subject matter—but it is jurisdiction, and now the Reporter comes back and says that is so and wants to have our last rule, Rule 82, recognize that fact by merely saying that we don't extend jurisdiction over the subject matter; but he does not say that we do not extend jurisdiction over the person. I think we are giving away our case as to whether it is procedural jurisdiction.

4 Proceedings of the Advisory Committee on Rules for Civil Procedure, *supra*, at 1092 (May 20, 1943).

A number of cases, including *Sibbach* itself, have recognized "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute." *Sibbach*, 312 U.S. at 10 (footnote omitted); *see supra* note 59. One of the cases cited in support of that proposition in *Sibbach*, 312 U.S. at 10 n.9—*Davidson Bros. Marble Co. v. United States ex rel. Gibson*, 213 U.S. 10 (1909)—involved territorial rather than subject-matter jurisdiction. *See also* *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635-36 & n.7 (1924). The court rule involved in *Davidson*, however, was invalid because it was inconsistent with the statute granting an appeal to the Supreme Court. *See* 213 U.S. at 18. Alternatively, it was invalid because inconsistent with the statute conferring jurisdiction on the circuit courts. *See id.* 19. In any event, cases discussing the rule-making power must be read in context. *But see* *Landers*, *supra* note 31, at 856 & n.49. An important part of the rulemaking context prior to the Act was the requirement that court rules not be inconsistent with statutes. *See supra* note 654; *Durabilt Steel Locker Co. v. Berger Mfg. Co.*, 21 F.2d 139 (N.D. Ohio 1927).

During the campaign for the uniform federal procedure bill, the ABA consistently maintained that "the statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter." *See supra* text accompanying note 237 (excerpt from standard report of ABA Committee on Uniform Judicial Procedure). The 1926 Senate Report incorporated that language verbatim. *See supra* note 317. At the 1924 Senate Hearing, Justice Van Devanter assured Senator Cummins that the Court had "always dealt with" service outside of the "jurisdiction" (Cummins had referred to "nonresidents of the district or of the State in which the suit is brought") "as a question to be regulated by Congress or by statutes and not as a matter to be regulated by rules." 1924 *Senate Hearing*, *supra* note 269, at 62; *see supra* text accompanying note 276.

It should be noted, on the other hand, that the New York Board of Statutory Consolidation, from whose 1912 Report the ABA and the 1914 House Report adopted the abstractions used to describe the uniform federal procedure bill, *see supra* text accompanying notes 185-86, included in the court rules proposed in its 1915 Report extensive provisions regarding service that seemingly would have had the effect of defining the territorial jurisdiction of the courts. *See* 1 1915 NEW YORK REPORT, *supra* note 175, at 89-95, 310-24. That may have been one reason the report was subsequently rejected. *See* 1919 NEW YORK REPORT, *supra* note 175, at 21.

From the point of view of federalism values, the regulation of the territorial jurisdiction of the federal courts can affect, as the regulation of subject-matter jurisdiction affects, the allocation of business between the federal and state courts. Indeed, original Rule 4(f) was designed specifically to address discontinuities between state and federal jurisdiction arising from the limitation to service within the district. *See* 1 MOORE & FRIEDMAN, *supra* note 526, § 4.38. That may have been a desirable reform, but both its purpose and effect suggest that, if the Act is interpreted in light of the pre-1934 history, it is a reform that should have been implemented by Congress.

rights and remedies"? It may be, as suggested above, that the Act should not be read to include the interests recognized in the due process clause in that category. Whether or not that is the case, we should not grieve that Rule 4(d)(1), insofar as it regulates generally the mode and manner of giving notice of the commencement of a lawsuit, may affect or displace federal or state policies extrinsic to the litigation process.<sup>674</sup> The place for the implementation of such policies is not in general prescriptions about notice or similar matters, where they will likely remain unknown to, and unknowable by, federal rulemakers.<sup>675</sup> That perception suggests what makes *Hanna* a hard case. Although the Court would have been correct, for the reasons suggested above, in upholding Rule 4(d)(1) as a means of giving notice of the commencement of litigation and insuring a fair opportunity to appear and be heard, the state statute in *Hanna* was not concerned with notice in that sense.

According to the court of appeals whose decision was reviewed in *Hanna*, the manner of service provided in Rule 4(d)(1) "was in entire compliance with . . . the usual Massachusetts procedure, so far as service was concerned. Further, the action was commenced in time, and served in time, in full compliance with the requirements of the ordinary Massachusetts statutes of limitations."<sup>676</sup> "The difference," according to the court of appeals, "was that in addition to service sufficient to satisfy due process requirements for in personam jurisdiction, the executor . . . was by law entitled to receive specific notification of the action within the year."<sup>677</sup>

The court of appeals' gloss confirms what a fair reading of the statute as a whole suggests, namely that the statutory provisions in question were the functional equivalent of a tolling rule.<sup>678</sup> The Supreme Court's attempt to bifurcate the statute

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<sup>674</sup> But see Chayes, *supra* note 82, at 751-52; Ely, *supra* note 82, at 759-62.

<sup>675</sup> This says nothing of litigants, who may well be wary of suing in federal court if their ability to use federal as opposed to state procedures depends upon their ability to identify correctly the policies animating the latter and the outcome hangs in the balance. See *supra* notes 495-96 & 510.

<sup>676</sup> *Hanna v. Plumer*, 331 F.2d 157, 159 (1st Cir. 1964), *rev'd*, 380 U.S. 460 (1965).

<sup>677</sup> *Id.*

<sup>678</sup> The statute provided, in pertinent part:

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has

into limitations provisions and notice provisions was artificial.<sup>679</sup> which may explain why Justice Harlan deemed *Ragan* impossible to distinguish and was moved to express his disagreement with the result in that case.<sup>680</sup> Moreover, in its elaborate dictum considering whether a federal common law rule identical to Federal Rule 4(d)(1) would yield before the Massachusetts statute, the Court's attempt to distinguish *Ragan* was notably unsuccessful.<sup>681</sup> Forum-shopping was of no more concern on the facts of that case than it was on the facts of *Hanna* or, for that matter, of *Walker*, where the Court recognized the difficulty.<sup>682</sup>

But *Hanna* was a case involving a Federal Rule, not federal common law. Whether or not detailed inquiry into the facts or the impact of a particular state law configuration on choice of forum is appropriate in cases involving federal common law,<sup>683</sup> it is not an inquiry called for by the Act interpreted in the light of the pre-1934 history. What the Court observed about Rule 3 in *Walker* is true also of Rule 4. "There is no indication that the

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been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate.

MASS. GEN. LAWS ANN. ch. 197, § 9 (West 1958).

<sup>679</sup> See 380 U.S. at 462-63 n.1.

<sup>680</sup> See *id.* 476-77 (Harlan, J., concurring).

<sup>681</sup> See *id.* 469 & n.10. In *Ragan*, the plaintiff, in choosing a forum, was no more "presented with a situation where application of the state rule would wholly bar recovery," *id.*, than was the plaintiff in *Hanna*. See *Ragan*, 337 U.S. at 531; Blume & George, *supra* note 633, at 956. Both had sufficient time to comply with either state or federal law.

<sup>682</sup> See 446 U.S. at 752-53 & n.15. By considering the facts of the case before it and failing to give meaningful content to the notion of "inequitable administration" of the law, the Court in *Walker* "unmodified" the outcome-determination test. See McCoid, *supra* note 597, at 888-89, 896; Chisum, Book Review, 33 STAN. L. REV. 1161, 1176-77 (1981).

If the inquiry does not focus on the facts of individual cases, one does find a difference between *Ragan* and *Walker* on the one hand and *Hanna* on the other. For whereas forum-shopping to avoid the state statutes (including their tolling rules) would be predictable in a class of cases if there were a federal common law tolling rule identical with Rule 3, see Horowitz, *Erie R.R. v. Tompkins—A Test to Determine Those Rules of State Law to which its Doctrine Applies*, 23 S. CAL. L. REV. 204, 215-16 (1950), the same cannot be said about a federal common law rule identical with Rule 4(d)(1). The reason, however, is not that given by the Court in *Hanna*, see 380 U.S. at 469 n.11: comparative assessments of the likelihood of obtaining a default judgment. Rather, under the Massachusetts statute an alternative to in-hand service seemingly provided as speedy a means of tolling the statute as service at the defendant's abode. See *supra* note 678. Of course, this analysis merely shifts the focus from the facts of the case to a particular competing state law configuration, which is no less clearly problematical for the test formulated in *Hanna* and applied in *Walker*.

<sup>683</sup> See *supra* note 682.

Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations.”<sup>684</sup> Moreover, insofar as the Act is concerned, it appears that the Massachusetts provisions were as much an “integral part” of the statute of limitations as the Oklahoma provisions in *Walker*.<sup>685</sup> That they may not reflect single-minded attention to one policy, or even a wholly rational adjustment of a number of competing policies,<sup>686</sup> is irrelevant. By invoking a “threat” that did not exist,<sup>687</sup> and by dissecting the Massachusetts statute with a scalpel, the Court in *Hanna* provided itself with an occasion to circumvent the Act’s limitations in the interest of clarifying the confusion wrought by its precedents. The lower courts and commentators were right. In a sense, *Hanna* did overrule *Ragan*.<sup>688</sup>

## 2. Physical and Mental Examinations: *Sibbach*

The Advisory Committee also failed explicitly to acknowledge any problem of rulemaking power in connection with Rule 35, authorizing physical and mental examinations of parties. The Notes to its drafts suggest, however, some awareness that a question might be raised in that regard.<sup>689</sup> More important, Rule 35 attracted attention and prompted questions and discussion in Congress.<sup>690</sup> Both facts were noted by the Court in *Sibbach*,<sup>691</sup> but the conclusions it drew from them are insupportable.

<sup>684</sup> 446 U.S. at 750-51 (footnote omitted).

<sup>685</sup> See *supra* note 625.

<sup>686</sup> See *McCoid*, *supra* note 597, at 912-14. Compare *Chayes*, *supra* note 82, at 751-52 with *Ely*, *supra* note 82, at 759-62.

<sup>687</sup> “Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari . . .” *Hanna*, 380 U.S. at 463. In a footnote, the Court adduced “a number of state service requirements which would not necessarily be satisfied by compliance with Rule 4(d)(1).” *Id.* 463 n.2. None of them, however, involved service or notice in connection with a state limitations provision. *Ragan* was proof, and *Walker* reconfirmed, that “for their separate purposes” a Federal Rule and a state statute “may both apply in federal court in a diversity action.” *Walker*, 446 U.S. at 752 n.13.

<sup>688</sup> See *supra* text accompanying note 618.

<sup>689</sup> See *Preliminary Draft*, *supra* note 520, at 70 (note to Draft Rule 39); *April 1937 Report*, *supra* note 547, at 88 (note to Draft Rule 35); *Advisory Committee Notes*, *supra* note 561, at 32 (note to Rule 35).

<sup>690</sup> See, e.g., 1938 *House Hearings*, *supra* note 435, at 117, 141; 1938 *Senate Hearings*, *supra* note 435, pt. 1, at 9-10; *id.*, pt. 2, at 29-30, 36-37, 39. The proposed Rule also attracted attention in the literature. See, e.g., *Ohlinger*, *supra* note 36, at 470, 474.

<sup>691</sup> See 312 U.S. at 15-16.

The Court in *Sibbach* observed that the Advisory Committee's Notes called "attention to the contrary practice indicated by the *Botsford* case."<sup>692</sup> But in its Note accompanying the final version of Rule 35, the Advisory Committee also erroneously described a subsequent decision of the Court, *Camden & Suburban Ry. Co. v. Stetson*,<sup>693</sup> and assimilated to the authority to order a physical examination in the state statute in *Stetson*, the authority created by Rule 35 itself.<sup>694</sup>

The Court adopted the Advisory Committee's reasoning<sup>695</sup> and went on to extol the "value of the reservation by Congress of the power to examine proposed rules . . . before they become effective."<sup>696</sup> It concluded with respect to Rule 35 that the absence of adverse action by Congress "indicates, at least, that no transgression of legislative policy was found."<sup>697</sup> The Court's reliance on the congressional review mechanism in section 2 of the Act lacks theoretical or empirical support generally.<sup>698</sup> Moreover, by referring to the Advisory Committee's Notes and the legislative

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<sup>692</sup> *Id.* 15; see Preliminary Draft, *supra* note 520, at 70 (note to Draft Rule 39).

<sup>693</sup> 177 U.S. 172 (1900). See *Advisory Committee Notes*, *supra* note 561, at 32 (note to Rule 35), where it was erroneously stated that the state statute was "made operative by the conformity act." In fact, as the Court acknowledged in *Sibbach*, 312 U.S. at 12-13, reliance had been placed on the Rules of Decision Act. Mrs. Sibbach had brought this error to the Court's attention. See Brief in Support of Petition for Certiorari at 38, 49-50. In correspondence, Professor Sunderland admitted the error and the possible inference that could be drawn from reliance on the Rules of Decision Act, asserting, however, that the result would have been the same if the Court had relied on the Conformity Act. See letter from Edson R. Sunderland to Leland L. Tolman (April 25, 1940) (copy on file with the *University of Pennsylvania Law Review*). In fact, in light of the Court's reasoning in *Botsford*, it would have been impossible for the Court to rely on the Conformity Act in *Stetson*, and the reliance on the Rules of Decision Act is not much easier to reconcile with that reasoning. These cases are one of many examples of the hazards of relying on prior classifications in deciding questions under the Act or under *Erie*. In that regard, Judge Clark regarded Sibbach's objection to the Note as "in line with modern attempts, unfortunately sound strategically, to rest everything on *Erie R.R. v. Tompkins*." Letter from the Hon. Charles E. Clark to Leland Tolman (April 29, 1940) (Clark Papers, *supra* note 529, Box 113, Folder 70A).

The explanation of Rule 35 at the House and Senate Hearings left a good deal to be desired from the point of view of candor and accuracy. See 1938 *House Hearings*, *supra* note 435, at 141 (statement of E.B. Tolman); 1938 *Senate Hearings*, *supra* note 435, at 9 (statement of W.D. Mitchell); *infra* note 723.

<sup>694</sup> See *Advisory Committee Notes*, *supra* note 561, at 32; see also 1938 *House Hearings*, *supra* note 435, at 117.

<sup>695</sup> "In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it." 312 U.S. at 13.

<sup>696</sup> *Id.* 15.

<sup>697</sup> *Id.* 16.

<sup>698</sup> See *supra* text accompanying notes 395-98.



history of the Rule, the Court sought to support the general proposition with particular illustration.

a. *The Legislative History of the Rules*

Since the Court acknowledged the attacks on Rule 35 in the 1938 House and Senate Hearings on the proposed Rules, its statement that "no effort was made to eliminate it"<sup>699</sup> must be taken to characterize the results of the congressional review process. So viewed, the statement is, at best, misleading. The House Judiciary Committee recommended that the proposed Civil Rules be permitted to go into effect.<sup>700</sup> In the Senate, on the other hand, a determined effort was made, supported by the Senate Judiciary Committee, not to eliminate one or more of the proposed Rules deemed substantive, but to postpone the effective date of the entire package so that Congress might give it "thorough study and examination."<sup>701</sup> The effort failed in the Senate, in part, it may be assumed, because it came up in a "late hour of the session,"<sup>702</sup> and in part because the attitude toward the proposed Rules in the House made it unlikely that both bodies would agree.<sup>703</sup> This is enough to cast doubt on the significance of the absence of congressional action. But there is more. Supporters of the proposed Rules gave assurances to Congress that there was "an easy way to challenge" the validity of a Rule as substantive and that the Supreme Court would be "zealous to correct its mistake, if any has

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<sup>699</sup> 312 U.S. at 15; cf. Ely, *supra* note 3, at 721 ("there is no evidence of a reaction of betrayal or even surprise at the time of promulgation [of the original Federal Rules of Civil Procedure]").

<sup>700</sup> 1938 HOUSE REPORT, *supra* note 601. An account of the legislative consideration of the proposed Rules may be found in Chandler, *supra* note 41, at 505-12.

<sup>701</sup> S. REP. NO. 1603, 75th Cong., 3d Sess. 2 (1938). Rule 35 was specifically noted as presenting "conflicts and uncertainties." *Id.* 3. The Senate Report was made before the Senate Hearings were held. Chandler, *supra* note 41, at 510. The latter were said to have been held in response to a request by the Attorney General. See 1938 Senate Hearings, *supra* note 435, pt. 1, at 1. See also Mitchell, Memorandum to the Members of the Advisory Committee, *supra* note 569. Mitchell was of the view that Senator King's real hope in sponsoring S.J. 281 was not merely to postpone, but to defeat, the proposed Rules. See *id.* This view may find support in the fact that "King pleaded forgetfulness" when reminded that he had promised a hearing on the proposed Federal Rules before anything was done in the Senate. Letter from Edgar B. Tolman to Charles E. Clark (undated but written April 25, 1938) (Clark Papers, *supra* note 529, Box 112, Folder 61).

<sup>702</sup> 83 CONG. REC. 8474 (1938) (remarks of Senator King); see Mitchell, Memorandum to the Members of the Advisory Committee, *supra* note 569.

<sup>703</sup> Chandler, *supra* note 41, at 511; see Mitchell, Memorandum to the Members of the Advisory Committee, *supra* note 569.

been made.”<sup>704</sup> With the exception of cases in which it has read Federal Rules not to apply, however, the main thing the Supreme Court has been zealous about in considering challenges to their validity has been taking cover behind the process employed prior to their effective date, particularly that part of it permitting congressional review. Such has been the rulemaking *renvoi*.

### b. *Sibbach's Arguments*

The invocation of congressional approval was not the only makeweight suggesting that, notwithstanding the test the Court formulated, *Sibbach* was a hard case for the majority as well as for the Justices who dissented. The view is apparently not uncommon that the Court might have been forced to confront the limitations in the Act, rather than invited to define them away, if Mrs. Sibbach had had better representation.<sup>705</sup> Actually, the Court created its own invitation, simplifying Sibbach's arguments, and stripping them of functional rationale, to the point of distortion.<sup>706</sup> Not that Sibbach's briefs are paragons. There is confusion, although no greater than that evinced by the Court, about the relationship between the Rules Enabling Act and the Rules of Decision Act.<sup>707</sup> There is also confusion about the relevance of state law to the question of validity under the Act—although, again, no more profound than that under which the Court was laboring.<sup>708</sup> Finally, there is imprecision in formulating the standards advanced in order to implement the Act's limitations.<sup>709</sup>

All of these are, however, quibbles, considering that Sibbach identified accurately the purpose served by the procedure/substance dichotomy<sup>710</sup> and proposed criteria for the allocation of

<sup>704</sup> Letter from Edgar B. Tolman to the Hon. J.C. O'Mahoney, the Hon. W.H. King, the Hon. E.R. Benke and the Hon. W.R. Austin (May 26, 1938), reprinted in 1938 *Senate Hearings*, *supra* note 435, app. at 72; see also 1938 *Senate Hearings*, *supra* note 435, at 16.

<sup>705</sup> See, e.g., Ely, *supra* note 3, at 733 n.213; Fyr, *supra* note 637, at 274-75.

<sup>706</sup> See *supra* notes 62-64 and accompanying text. Compare Brief in Support of Petition for Certiorari at 18-29, 39-46 with 312 U.S. at 11, 13-14.

<sup>707</sup> See, e.g., Brief in Support of Petition for Certiorari at 15-16.

<sup>708</sup> See, e.g., *id.* 16, 47. On the latter page, Sibbach noted that the incorporation principle discussed in *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635-36 (1924), quoted *supra* note 580, might, in combination with the Rules of Decision Act, see *infra* note 713, save Rule 35 in states which authorized physical examinations.

<sup>709</sup> See Brief in Support of Petition for Certiorari at 18-29, 39-46.

<sup>710</sup> See, e.g., *id.* 26:

This line of argument would seem to indicate that there are "procedural" matters that involve such broad and important questions of policy that the

lawmaking competence that, although imprecise, provided a starting point from which the Court could have addressed the admittedly difficult task of translating congressional shorthand into a workable system of Federal Rules.<sup>711</sup> Equally important, Sibbach drew the Court's attention to the support for her functional argument, and some of its implementing abstractions, in the views of Shelton and in the 1926 Senate Report.<sup>712</sup>

The court ignored Sibbach's functional argument and the evidence that it was consistent with Congress's intent, posited a dilemma that did not trouble Sibbach, and asked the wrong question, thereby setting up a strawman.<sup>713</sup> However imprecise Sibbach's statement of criteria, and however confusing her willingness to concede the validity of Rule 35 in states where physical examinations were permitted,<sup>714</sup> she recognized that allocation of powers concerns rather than federalism concerns animated the Act's

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power to make rules about them may not be delegated by Congress to the Courts under the doctrine of separation of powers. However, in the instant case it is not necessary to pursue this line further in view of the language of the Rules Enabling Act. It may be that the doctrine of separation of powers does not forbid Congress to delegate to this Court the power to decide by rule whether or not a plaintiff may be compelled in a federal court to submit to a physical examination. But it is contended here that Congress has not in fact delegated the power by the Rules Enabling Act.

Note, however, that Sibbach attributed independent significance to the Act's second sentence, *see id.* 26-29, whereas its purpose was to emphasize restrictions inherent in the first. *See supra* text accompanying notes 424-29.

<sup>711</sup> *See, e.g., id.* 24 (distinguishing "a detail of practice with which a court is more familiar than the legislature" from matters involving "a general principle or a question of public policy that the legislature is able to pass on (and perhaps which can be most effectively considered in a forum where there are opportunities for full debate)"), 25 & 29 (privileges), 39-44 (arguing that the "considerations of policy in the determination to grant or not to grant courts the power to compel a physical examination are of such a nature that the granting of the power is a 'substantive' matter which Congress did not intend to delegate to this Court." *Id.* 39).

<sup>712</sup> *See* Supplemental Brief of Petitioner at 2-7.

<sup>713</sup> *See supra* note 62. Sibbach argued that, Rule 35 being invalid, the law to be applied was that of Illinois. Initially, she contended that this result followed, even though Rule 35 affected "substantive rights," by analogy to the rule contained in RESTATEMENT OF CONFLICT OF LAWS § 585 (1934), directing the application of the law of the forum as to matters of procedure. *See* Brief in Support of Petition for Certiorari at 52. She also relied on the reference in *Stetson*, 177 U.S. at 175, to the law of the state in which the federal court sat under the Rules of Decision Act. *But see Sibbach*, 312 U.S. at 13. In her Reply to Brief of Respondent at 3-5, Sibbach found it necessary to correct alleged misunderstanding of this argument, making clear her view that Illinois law was "pertinent in this case only 'in connection with' the Rules of Decision Act and only apart from Rule 35." *Id.* 5. Thereafter, Sibbach cited *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940), for the proposition that Illinois law controlled. *See* Supplemental Brief of Petitioner at 9-10.

<sup>714</sup> *See supra* note 708.

dichotomy, that the Act's limitations were intended to fence off from rulemaking more than the substantive law, and that the search for substantive rights that are relevant for that purpose must be made elsewhere than among state law choices on the matter of physical and mental examinations.

c. *Rule 37: A Two-Edged Sword*

Notwithstanding the Court's announcement at the beginning of the opinion that the case called "for decision as to the validity of Rule 35 and 37,"<sup>715</sup> Sibbach herself had challenged only the former.<sup>716</sup> It remained for William D. Mitchell, the Chairman of the Advisory Committee, to point out in an *amicus curiae* brief that the district court had exceeded its power under Rule 37 in ordering Mrs. Sibbach confined for her refusal to submit to a physical examination.<sup>717</sup> Sibbach's (or rather her lawyer's) motive in failing to raise the issue is not difficult to discern.<sup>718</sup> Still, accepting the Court's holding that the contempt order was plain error,<sup>719</sup> in what respect can the case be thought to have involved "decision as to the validity of Rules 35 and 37"?

The Court was careful to note: "The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that, as we hold, [under Rule 37] no invasion of freedom from personal restraint attaches to refusal so to comply with [Rule 35's] provisions."<sup>720</sup> This would seemingly have been

<sup>715</sup> 312 U.S. at 6; see also *id.* 9, 11, 14.

<sup>716</sup> See, e.g., Petition for Writ of Certiorari at 3-4; Brief in Support of Petition for Certiorari at 15-16; Brief for the Respondent in Reply to the Several Briefs Filed by Petitioner at 2 ("Neither the form of the order itself, nor the penalty of arrest and imprisonment for contempt because of failure to obey it, has ever been questioned in this case . . ."). But see, e.g., Miller, *supra* note 23, at 744.

<sup>717</sup> See Brief of William D. Mitchell as Amicus Curiae at 1, 3.

<sup>718</sup> Sibbach claimed to have interpreted Rule 37 as allowing a contempt order, as opposed to "arrest." Reply to Brief of Respondent and to Brief of William D. Mitchell, Amicus Curiae at 5-6. She also admitted, however, that she was "particularly interested in having the court determine that she need not submit to a physical examination." *Id.* 6. In fact, *Sibbach* was a test case from the beginning. The trial judge entered a contempt order to assist Sibbach's counsel in challenging the validity of Rule 35. Moreover, *both parties* deliberately chose not to raise the Rule 37 question so as to present the "real question." Letter from J.F. Dammann (counsel for the respondent) to William D. Mitchell (April 26, 1940) (copy on file with the *University of Pennsylvania Law Review*).

<sup>719</sup> See 312 U.S. at 16.

<sup>720</sup> *Id.* 14. This passage originally included, after "ignores the fact that," the words, "a litigant need not resort to the federal courts unless willing to comply with the rules, and that . . ." In her petition for rehearing, Sibbach pointed out that the passage did not accurately describe the situation of a plaintiff in a case removed from state court. See Petition for Rehearing at 1-3. It was also inappropriate as to a defendant. In denying the petition for rehearing, the Court amended its opinion

irrelevant if, as the Court held, the Act authorized any rule that "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."<sup>721</sup> And as the dissent pointed out, "[o]f course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination."<sup>722</sup> The provision in Rule 37 and the Court's emphasis on that provision in *Sibbach* suggest that both the Advisory Committee and the Court were aware that Federal Rules might be invalid even though they "really regulate procedure" and even though, as Justice Frankfurter recognized, such Rules would be valid if enacted by Congress.<sup>723</sup> But the Court's explanation of the way in which that problem is obviated raises more questions than it answers. For it suggests the invalidity of Rule 37, to the extent it authorizes an "invasion of freedom from personal restraint" (i.e., arrest) for disregard of *any* discovery order.<sup>724</sup>

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by striking these words and adding, after the word "comply," the words "with its provisions." 312 U.S. 655 (1941). See Commentary, *Sibbach v. Wilson & Co.: Implications of the Supreme Court's Opinion*, 4 Fed. R. Serv. 35a.5 (1941).

<sup>721</sup> 312 U.S. at 14.

<sup>722</sup> *Id.* 18 (Frankfurter, J., dissenting).

<sup>723</sup> See *id.* 17. At the 1938 Senate Hearings, Mr. Mitchell was asked by Senator King whether he considered "it procedural to compel a person to submit to a physical examination." 1938 Senate Hearings, *supra* note 435, at 9. Mitchell replied:

You cannot compel him, but you can limit his right to maintain his action in a personal injury suit. That is done everywhere. There are decisions of the Supreme Court on that question. The rules on that subject are substantially the law. There is nothing new about them. The courts generally regard that as a procedural matter. Of course, if you are going to say that every step in a lawsuit that a man has to take in order to gain his rights is a matter of substantive right, you have nothing left in the way of procedure.

*Id.* This statement was hardly a fair representation of the law at the time it was made. See Note, *Physical and Mental Examinations of Parties under New Federal Rule 35(a)*, 34 ILL. L. REV. 103, 104-05 (1939).

<sup>724</sup> Mr. Mitchell's *amicus curiae* brief included excerpts from the proceedings of the Advisory Committee at which the predecessors of Rules 35 and 37 were discussed. Mitchell himself had doubts about the constitutionality of forcing a person "to exhibit his person." Brief of William D. Mitchell as Amicus Curiae at 29. Mr. Lemann noted that constitutional questions had also been raised about sentencing a person for contempt who refused "to produce the automobile or some other thing which he considers his own business." Mitchell suggested that "[p]erhaps you are making a distinction between an automobile and a man." Mr. Wickersham observed: "A good many automobiles are worth more than some men." *Id.*; see also *id.* 32-36.

Rule 35 was not the only discovery rule attacked before Congress. See, e.g., 1938 Senate Hearings, *supra* note 435, pt. 2, at 28-29 (Rule 34), 30 (Rule 37), 47 (Rule 37). Mrs. Sibbach was at pains to distinguish the other discovery rules on the ground that they reflected remedies at least some of which were available prior to trial in equity, and related to matters provable at trial, whereas prior to the Federal Rules of Civil Procedure "a court could not compel a litigant to expose his body at the trial for examination either by the jury or by medical experts." Brief in Support of Petition for Certiorari at 45.

d. *Rules 35 and 37 Analyzed in the Light of the Pre-1934 History*

Unlike the aspects of provisional and final remedies that were of most concern to Cummins and the 1926 Senate Judiciary Committee, Rule 35 cannot easily be equated with rules of substantive law in its effect on person or property. For the latter are distinctive precisely in their effects on out-of-court conduct.<sup>725</sup> Viewed in isolation, Rule 35 not only speaks to, but it regulates conduct only in, the context of a lawsuit, in much the same way as the other discovery rules. Similarly, viewed apart from the question of sanctions, a Rule regarding physical or mental examination will have no more predictable or identifiable effect on rights recognized under the substantive law than any Rule regarding discovery.<sup>726</sup> Finally, interests in privacy are implicated in connection with other discovery Rules, and in 1941 there was little basis in constitutional decisions to recognize or distinguish them.<sup>727</sup>

One is forced back to the question of sanctions. It was apparently the coercive nature of provisional and final remedies, and the predictable and identifiable effect that choices in those areas would have on person or property, that prompted their characterization as substantive in the 1926 Senate Report. Cannot the same be said of orders imposing sanctions, or at least of arrest orders, whether for violation of an order to submit to a physical examination or of any other discovery order, and should we not therefore conclude that rulemaking in the area is forbidden?<sup>728</sup>

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<sup>725</sup> See *supra* text accompanying notes 512-13.

<sup>726</sup> In a sense it is true that every procedural rule has consequences of a substantive nature, for every such rule may affect the outcome in some cases, and some of them are deliberately intended to alter the outcome in many cases. When the discovery rules were adopted in 1938 they were expected to "make a trial less a game of blindman's bluff and more a fair contest." This presupposed that they would change the results in many cases. Every lawyer can think of cases that he won only because of what he learned from discovery—or that he lost only because his opponent had access to discovery. Yet I have no doubt that the adoption of these rules was a valid exercise of the rulemaking power. Although they affect the outcome of cases, they do so in a quite unpredictable fashion, and do not help or hurt any particular identifiable class of litigants.

Wright, *supra* note 20, at 570-71 (footnote omitted).

<sup>727</sup> See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 570-73 (10th ed. 1980); see also *Sibbach*, 312 U.S. at 17 (Frankfurter, J., dissenting). But see *supra* note 724. On developing constitutional norms, see *infra* note 759.

<sup>728</sup> Certainly, as in all areas covered by the Federal Rules, Congress has the power to override a Federal Rule with respect to sanctions, and it has done so. See Act of Oct. 21, 1980, Pub. L. No. 96-481, Title II, § 205(a), 94 Stat. 2330 (repealing FED. R. CIV. P. 37(f)); 4A MOORE, *supra* note 41, ¶ 37.07. Whatever the irreducible inherent judicial power in this area, see, e.g., *Frankfurter & Landis, supra* note 2, it does not include supervisory court rules. See *supra* note 455.

A Federal Rule requiring a federal court to find a litigant in contempt for violation of an order would raise serious questions of power. But that is not what Rule 37 did at the time *Sibbach* was decided nor what it does today. Instead, the Rule leaves it to the discretion of the court to pick from among a variety of sanctions, only partially enumerated, as the facts of the case may warrant. At least to the extent the Rule does no more than enumerate sanctions that might have been imposed by a federal court prior to 1938, the Rule, since it makes no choices, is unexceptionable.<sup>729</sup>

The Supreme Court may have recognized in *Sibbach*, as a member of the Advisory Committee had suggested previously, that the Act should not be read to authorize rulemaking with respect to matters "which constitute direct interference with personal liberty or control over property."<sup>730</sup> By adducing Rule 37 in support of its holding, however, the Court in fact cast a greater shadow over the Rules than *Sibbach* intended. Her argument was limited to Rule 35. It was rejected, as it should have been, but for the wrong reasons. In the absence of an identifiable deprivation of personal liberty, Mrs. *Sibbach* could not equate Rule 35 with those matters deemed substantive, quite apart from existing legal sources, in the pre-1934 legislative history. Her rights under the substantive law were not implicated in any identifiable way. Her argument that the "right" she claimed was protected because it was substantial, or important, or involved questions of legislative policy, missed the mark because it failed to make a persuasive case that hers was an interest specifically protected by the Constitution, which the pre-1934 history of the Act suggests as the guide on such questions.<sup>731</sup>

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<sup>729</sup> In that respect, Rule 37 should be compared with Rules 6(b) and 60(b), which grant discretion to relieve the parties from effects of Rules regarding time limitations after an action has been commenced and judgments entered without notice, that might otherwise be proscribed under the Act. See *supra* notes 607 & 666. All of these Rules preserve for the federal courts a distinctive feature of the common law method, flexibility to adjust the law applied to the facts of an individual case. Cf. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 125 (1968) ("Rule 19(b), which the court of appeals dismissed as an ineffective attempt to change the substantive rights stated in *Shields*, is, on the contrary, a valid statement of the criteria for determining whether to proceed or dismiss in the forced absence of an interested person. It takes, for aught that now appears, adequate account of the very real, very substantive claims to fairness on the part of outsiders that may arise in some cases.").

<sup>730</sup> *Sunderland*, *supra* note 166, at 406. But see *supra* notes 537-38.

<sup>731</sup> The 1915 New York Report, the source for a good deal of the analysis in the 1926 Senate Report, included in the proposed Civil Practice Rules a Rule (238) with respect to physical examinations in personal injury actions. 1 1915 NEW YORK REPORT, *supra* note 175, at 103.

## VI. CONCLUSION

Just as it is regrettable that the pre-1934 history of the Rules Enabling Act has been neglected, so it would be foolish to accord that history decisive significance in the Act's interpretation. Numerous considerations arising from events before and after 1934 affect the weight that properly can be attributed to the Act's antecedent period of travail. They do not, however, deprive it of relevance. Only the basic purposes of the legislation, and in particular of the procedure/substance dichotomy, as well as the answers to a few specific questions, are revealed with clarity. The rest is adumbration. For one who seeks light, shadows are preferable to darkness. Since the information to be gleaned from the period is rarely without ambiguity, it will remain possible for reasonable people to disagree about the solution under the Act, interpreted in the light of its history, of some of the problems of validity discussed in this Article as well as some others not addressed here. Moreover, it will remain possible for reasonable people to disagree about the appropriateness in 1982 of limitations on court rulemaking formulated more than fifty years ago. It should not remain possible, however, for anyone to approach the Act as if it sprang in full flower from the head of Homer Cummings in 1934, or as if it had become law in 1938.

Many aspects of, and many questions emerging from, the pre-1934 history of the Rules Enabling Act require further study. It suffices to mention two.

Although I have set forth as full an account of the history as appears relevant for interpretation, that account lacks important dimensions without which our understanding of the movement for uniform federal procedure is incomplete. The movement should be studied from the perspective of the legal and political philosophies of its supporters and opponents; it should be set in the broader social context in which it occurred.<sup>732</sup>

I have alluded to but not systematically addressed the question whether, in using as their guide to the allocation of power between the Supreme Court and Congress standards proposed for a state, New York, with a history of procedural regulation quite different from that in the federal system,<sup>733</sup> the supporters of the

<sup>732</sup> See Fish, *William Howard Taft and Charles Evans Hughes: Conservative Politicians as Chief Judicial Reformers*, 1975 SUP. CT. REV. 123, 136-38; Subrin, *supra* note 410, at 1651. Professor Subrin is presently at work on a book that may well fill this need.

<sup>733</sup> For the New York history, see *supra* notes 92, 117 & 134; *supra* text accompanying notes 144, 180 & 480. The 1915 New York Report was subsequently



uniform federal procedure bill ensured that those standards would be ignored. This question is of particular interest to the extent that the standards of allocation derived here from the pre-1934 history of the Act are thought to confine the Court's rulemaking either more than prior authorizations to fashion Equity Rules or more than, as a normative proposition, is appropriate. An answer to it should take account of the lack of attention paid to section 2 of the Cummins bill in congressional hearings and reports in the 1920's.<sup>734</sup> Moreover, the lessons of comparative law should make us wary of a hasty conclusion that the supporters' choice of a model doomed their effort to confusion. For "usually legal rules are not peculiarly devised for the particular society in which they now operate and . . . this is not a matter of great concern."<sup>735</sup>

Much also remains to be done with the work of the original Advisory Committee on Civil Rules. My research has focused on the narrow issue of the Committee's interpretation of the Act's procedure/substance dichotomy. The approach has been largely doctrinal. Now that the accessibility of most of the papers and correspondence of the Committee is public knowledge, we can hope for research that will further elucidate the issue I have identified and that will more generally explore the assumptions and predilections of the rulemakers.<sup>736</sup> Ultimately, we may be able to penetrate and discipline the dogmas that have marked debate about court rulemaking. We may also be able to make informed conclusions—the literature reviewed for this article is suggestive and disturbing—about legal scholarship in the aid of reform.<sup>737</sup> The Federal Rules of Civil Procedure were a remarkable achievement, but we know very little about their creation.

Some of the dogmas are, however, inescapable even in a preliminary effort like this. For they are likely to shape our responses to the central question posed by this article—the practical use that

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rejected, in part because some of the rules of court it proposed "pertain[ed] to jurisdiction, to due process of law, or conferr[ed] rights and privileges which should not be entrusted to the judgment of any court." 1919 NEW YORK REPORT, *supra* note 175, at 21; *see supra* note 673. For the federal history, *see supra* text accompanying notes 83-113. Other questions raised by the borrowing are discussed. *See supra* text accompanying notes 502-13.

<sup>734</sup> *See supra* notes 276, 297, 317 & 350; *supra* text accompanying notes 641-59.

<sup>735</sup> A. WATSON, *LEGAL TRANSPLANTS* 96 (1974). Moreover, there is evidence in the 1926 Senate Report that the New York model was altered to suit the perceived needs of the federal system. *See, e.g., supra* text accompanying note 477; *supra* note 518.

<sup>736</sup> *See supra* note 732.

<sup>737</sup> *See, e.g., supra* text accompanying notes 532-41; *see also* G. HAZARD, *RESEARCH IN CIVIL PROCEDURE* 13-16, 93-98 (1963).

can and should be made today of our knowledge of the Rules Enabling Act's history and of the work of the original Advisory Committee.

That the primary limitation imposed by the Act was intended to allocate lawmaking power between the Supreme Court as rule-maker and Congress and did not have any independent federalism purpose is at once the most demonstrable lesson of the pre-1934 history and the lesson that is most difficult to accept. Forty years of Supreme Court decisions and academic commentary have reversed this plan, with the result that federalism has loomed large, and allocation of powers between federal institutions hardly at all, in the discussion of Federal Rules. The Court's answer in *Hanna v. Plumer* to its previous hypersensitivity regarding the displacement of state law was to assimilate diversity to federal question cases. Because the Court had never acknowledged meaningful limitations on its rulemaking power in the latter, however, we were left with few limitations at all. So strong has this interpretive tradition been that even where concern about allocation of federal powers indisputably animated the congressional response to the proposed Federal Rules of Evidence, the Court observed only concern about federalism.<sup>738</sup>

Simply because federalism was not perceived as a discrete concern by those, including those in Congress, who supported the uniform federal procedure bill does not mean, of course, that it would not be properly a matter of attention if the Act were reinterpreted or if it were replaced. But although the *Hanna* Court reversed the original legislative priorities, it was surely correct in refusing to embrace two standards of validity for Federal Rules. Even when viewed apart from the pre-1934 history, an interpretive construct like the one suggested by Professor Ely appears Solomonesque: it is better to have Federal Rules valid in some cases, including some diversity cases, than not valid at all. But the premise is disputable, and the construct, if only for practical reasons, renders illusory the goal of prospective allocation. Every-

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<sup>738</sup> Compare *Trammel v. United States*, 445 U.S. 40 (1980) with H.R. REP. No. 650, 93d Cong., 1st Sess. 27 (1973) (separate views of Rep. Holtzman) [hereinafter cited as 1973 HOUSE REPORT] and 120 CONG. REC. 1420-21, 2391-92 (1974). The comparison suggests that the Court was in error when it stated that the requirement of congressional approval of privilege amendments in 28 U.S.C. § 2076 "was enacted principally to insure that state rules of privilege would apply in diversity jurisdiction cases unless Congress authorized otherwise." *Trammel*, 445 U.S. at 47 n.8. See also Westen & Lehman, *supra* note 30, at 363 n.154. Again, however, such is the effect of the requirement, which was promoted on the view that "[r]ules creating, abolishing or limiting privileges are legislative." 1973 HOUSE REPORT, *supra*, at 29 (separate views of Rep. Holtzman).

body knows that "procedure" and "substance" are elusive words that must be approached in context, and that there can be no one, indeed any, bright line to mark off their respective preserves. But the context of Federal Rules includes all the civil litigation in the federal courts, and neither uniformity nor simplicity is well served by a rulemaking charter that sanctions Federal Rules valid in one state and not in another, here today, gone tomorrow.<sup>739</sup>

Those who gave detailed consideration to the Cummins bill evidently believed that federalism values would receive adequate protection through interpretive standards designed to allocate power between the Supreme Court as rulemaker and Congress.<sup>740</sup> The theoretical support for that view has been noted, as has the importance to its realization of the formulation and manner of implementation of standards.<sup>741</sup> If the standards derived here from the pre-1934 history fail to satisfy, the explanation is close at hand. The supporters of the uniform federal procedure bill were ultimately forced by Senator Walsh's strategy of opposition to confront the implications of the Cummins bill's limitations with more than Thomas Shelton's platitudes. They failed, however, to articulate fully and consistently the standards envisioned. Few if any of those individuals were imbued with the Realists' counsel to think functionally. Moreover, the difficulty and essentially reactive nature of the enterprise shaped its content.

In recognizing the interdependence of procedure and substance, however, it is not necessary, although it may be convenient, to reject the utility of any attempt to develop rules or standards of classification for court rulemaking purposes. It is necessary to accept the fact that allocation rules, like other legal rules, will not appropriately adjust the competing policies and interests in all of the cases to which they are applied. We should, of course, be alert to the dangers of labels. We should question whether formalism exacts too heavy a price when the question is who should decide. But we should not continue to hide behind the dangers while pretending to perform a task mandated by Congress.<sup>742</sup>

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<sup>739</sup> In one sense, Professor Ely's interpretive construct, *see supra* notes 495-96 & 510, is like the incorporation principle. *See supra* text accompanying notes 577-611. His method, however, has the effect of retroactively validating a Federal Rule that incorporates in its substantive aspects state, not federal, law.

<sup>740</sup> The pre-1934 materials do not speak to the problem of federal common law. *See supra* note 447.

<sup>741</sup> *See supra* text accompanying notes 506-07.

<sup>742</sup> Of course, nowhere in the Act or in its legislative history did Congress require the rulemakers to proceed by general definition. The question is whether the costs of generalization exceed its benefits. *See infra* text accompanying notes 764-

For one conversant with the meager literature on the Act that is not preoccupied with federalism, the allocation standard most clearly suggested by the 1926 Senate Report will be familiar. A number of commentators have argued that impact on rights claimed under the substantive law is or should be a central concern under the Act.<sup>743</sup> They have recognized that such impact is pervasive in a procedural system and, in an effort to implement the concern without sapping the Act's grant of authority, have fastened on predictability or identifiability of impact as a standard of allocation.<sup>744</sup> That those who do not harbor a "mistaken extreme analytical idea of the separation of powers"<sup>745</sup> share this concern with the supporters of the uniform federal procedure bill should not come as a surprise. In this post-*Erie* age, it should be more insistent than ever. Moreover, to the extent one acknowledges inhibitions on the development of federal common law<sup>746</sup> and does not equate court rulemaking under the Act with legislation,<sup>747</sup> the concern cannot be confined to cases in which state law furnishes the rule of decision.

The pre-1934 history also suggests a concern about court rulemaking in areas where choices, even if not having a predictable and identifiable effect on rights claimed under the substantive law,

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83. In that regard, it is worthwhile to consider the alternatives. The ABA's Commission on Standards of Judicial Administration, having concluded that the "interconnections [between procedure and substance] make it impossible to define the scope of the rule-making power in precise and enduring terms," suggests working out the proper boundaries "by processes that go beyond strict legal definition." STANDARDS RELATING TO COURT ORG. § 1.31, commentary at 75 (1974). In fact, however, there is no evidence of *any* attempt at definition, except as the "process" of "reference to legal tradition and precedent" or "[d]ue recognition of historical categorizations" may be so characterized. See *id.* In resorting to historical categorizations in connection with the Act, does one rely on the pre-1934 history or on the post-1934 history? Note that a choice of the latter is a choice in derogation of the process recommended by the ABA Commission. As for the only other alternative to general definition proposed by the Commission, "one form or another of consultation and joint deliberation," *id.*, see *infra* text accompanying note 779.

Professor Hazard has reminded us that "a rule, to have cognitive and normative significance as such, must have an important degree of determinative content to the group to whom it is addressed." G. HAZARD, *supra* note 737, at 9; see also *id.* 8-11.

<sup>743</sup> See, e.g., Clinton, *supra* note 13, at 56-64, quoted in part *supra* text accompanying note 515; Wright, *supra* note 20, at 569-71, quoted in part *supra* note 726. Cf. Landers, *supra* note 31, at 855-61 (remedial provisions that should be left to legislative regulation). Professor Clinton notes that this concern has been shared by individual Justices in dissenting from the promulgation of Federal Rules. See Clinton, *supra* note 13, at 61.

<sup>744</sup> See, e.g., Clinton, *supra* note 13, at 56-64; Wright, *supra* note 20, at 569-71.

<sup>745</sup> Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 33 (1952).

<sup>746</sup> See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

<sup>747</sup> See Lesnick, *supra* note 12, at 582-83. Compare Degnan, *supra* note 22, at 288-89 with Mishkin, *supra* note 82, at 1687-88.

will create rights having a similar effect on person or property. It is not clear whether in this aspect the 1926 Senate Report was intended to reflect a more general view about the distinctive features of substantive law.<sup>748</sup> In any event, the recent literature on court rulemaking and the Federal Rules of Evidence experience suggest that the limitation, at least if confined by the specific examples illustrating it in the Senate Report, is too narrow when considered from either an allocation of powers or a federalism perspective.<sup>749</sup> Perhaps if the supporters of the uniform federal procedure bill had not categorically excluded court rules regulating the admissibility of evidence from the grant of authority, an exclusion that was patently overbroad, the problem would have been addressed. Certainly it is insistently presented in the area of privileges. Indeed, there is language in the 1926 Senate Report that, if not limited by specific examples and explanations, suggests a broader standard. Thus, if lawmaking in an area necessarily involves the consideration of public policy—policies extrinsic to the process of litigation—the choices in that area are for Congress.<sup>750</sup> The kinship of this formulation with that proposed by Professor Ely should be obvious.<sup>751</sup> So should the differences.

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<sup>748</sup> See *supra* text accompanying notes 487 & 501-02.

<sup>749</sup> See, e.g., Ely, *supra* note 3, at 718-40; Landers, *supra* note 31, at 855-61; Clinton, *supra* note 13, at 56-64; see also *supra* note 738.

<sup>750</sup> It is also urged by opponents of the bill that . . . rules might be framed which would deal with substantial rights and remedies in a manner contrary to the public policy of the several States embodied in local statutory law.

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. . . [The matters raised by Senator Walsh] are matters involving substantive legal and remedial rights affected by the considerations of public policy. . . . They involve the policy of the law which varies in the different States and are and always have been regulated by legislative act.

1926 SENATE REPORT, *supra* note 297, at 9. See also the reference to "legislative policy" in 1914 HOUSE REPORT, *supra* note 166, at 15, quoted *supra* note 168; *supra* note 329.

At the 1938 Senate Hearings, Edgar B. Tolman, the Secretary of the Advisory Committee, observed:

I am convinced that when a procedural provision lays down a rule of human conduct, when it constitutes a declaration of public policy, it may be both procedural and substantive law. Take for example, the statutes which limit the right of a wife to testify against her husband or the right of a husband to testify against his wife—that is a question of such public importance that I believe, although it is procedural, the legislature has a right to legislate upon it.

1938 *House Hearings*, *supra* note 435, at 131.

Tolman was alone in suggesting to Congress a lack of legislative power in any of the areas covered by Federal Rules. See *supra* note 461.

<sup>751</sup> See Ely, *supra* note 3, at 722-27; *supra* notes 495-96 & 510. Note that, passing Ely's federalism rationale, one need not follow him in suggesting a definition

The standard suggested here is not restricted to diversity cases. Nor does it depend upon a particularistic and after-the-fact inquiry into policies animating competing legal prescriptions. Therefore, it would not lead to the invalidation of Federal Rules in the face of non-obvious state (or federal) policies. It is, in other words, a standard for allocating federal decision-making, not a standard for protecting some, and only some, policy choices already made.<sup>752</sup>

A major objection to a standard of this sort—that it would lead to an unfortunate and inefficient division of labor, substituting politics for procedural expertise<sup>753</sup>—perhaps affected the scope of the proposed Federal Rules of Evidence. That experience, quite apart from Congress's response, raises the question whether the objection should prevail. Legal rules always represent choices among conflicting policies. It is well and good to uphold the constitutional power of Congress to "regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."<sup>754</sup> But there is reason to fear that, if the rulemakers are left to make choices in such areas, and whatever the purpose of the dichotomy, they will choose to advance those policies that are their special

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of "substance" more expansive than that formulated by Hart and Wechsler and espoused by Justice Harlan, *see* Ely, *supra* note 3, at 725-26, if a limitation on rulemaking in areas where choices will have a predictable and identifiable effect on rights claimed under the substantive law is accepted.

Professor Landers' admirable attempt to formulate a functional test for the Act's dichotomy recognizes that "[a]lso within the legislative sphere are matters bearing significantly on private primary conduct such as rules which have the effect of telling people what to do or what not to do." Landers, *supra* note 31, at 856 (footnote omitted). He also suggests as appropriate for legislative regulation "matters which are the subject of widespread public controversy, as differentiated from controversy solely among lawyers," *id.* 857 (footnote omitted), and, unnecessarily it would seem, analyzes privileges under that rubric. *See infra* note 758.

<sup>752</sup> *See supra* text accompanying notes 489-501 & 674-75. This standard would, however, require the rulemakers fully and fairly to canvass the policies that reasonably could be thought to compete for recognition in a given area. Obviously, they would usually be guided in that enterprise by lawmaking that had already occurred. *But see supra* note 490. If rulemaking with respect to a given matter could not fairly be said to implicate policies extrinsic to the litigation process, the fact that the rulemakers had disregarded, or a state legislature or court had subsequently passed or announced, an unusual competing rule reflecting such policies, should not vitiate the enterprise.

The 1926 Senate Report suggests the interpretive relevance of experience under state rulemaking arrangements. *See supra* note 523. The standard suggested here would require a broader familiarity with state and federal law. But it would not permit the invalidation of Federal Rules because of competing legal prescriptions that unpredictably advanced substantive policies.

<sup>753</sup> *See, e.g.,* Levin & Amsterdam, *supra* note 19, at 14-24, 37-41.

<sup>754</sup> *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

province and to subordinate those that are not.<sup>755</sup> To say Congress is likely to evince a similar bias in the other direction is not an answer, whether the concern is allocation of powers or federalism.<sup>756</sup>

Perhaps the most difficult matter touched upon in the pre-1934 history is rulemaking where constitutional interests are implicated. There is reason to dismiss the 1926 Senate Report as simply reactive on this aspect.<sup>757</sup> And yet none of the other allocation standards derived from the Report or suggested here would reach the situation, and constitutional interests that are procedural in one sense were of concern in connection with the Criminal Rules Enabling Act.<sup>758</sup> Moreover, as an original proposition, one must doubt the wisdom of a court making decisions affecting constitutionally recognized interests through a process other than adjudication.<sup>759</sup> The concern is greatest in criminal cases, which are beyond the scope of this article. But the problem deserves further attention, and it is an area in which what I have called the incorporation principle may play a major role.<sup>760</sup>

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<sup>755</sup> See, e.g., Proposed Fed. R. Evid. 501 advisory committee note (justifying the proposed displacement of state privilege law by, among other things, depreciating its "substantive aspect" and asserting a federal interest "in the quality of judicial administration").

<sup>756</sup> Moreover, notwithstanding Congress's recent penchant for exercising its pre-effectiveness power of review under the Act, see *supra* text accompanying note 4, one may doubt the efficacy of that mechanism in general to meet objections grounded in democratic theory, see Mishkin, *supra* note 82, at 1687-88, to say nothing of its efficiency for the future. See also *infra* text accompanying note 764.

<sup>757</sup> See *supra* note 488.

<sup>758</sup> See *supra* text accompanying note 664. Professor Clinton, *supra* note 13, at 60-61, recognized the problem in the context of federal post-conviction relief.

<sup>759</sup> See *supra* text accompanying note 515; *supra* note 668. It is doubtful that a standard allocating to Congress "matters which are the subject of widespread public controversy, as distinguished from controversy solely among lawyers," advocated by Professor Landers, see *supra* note 750, can now, if it ever could, function as a legal, let alone a constitutional, standard, rather than a counsel of caution. But see 1938 House Hearings, *supra* note 435, at 25 (statement of W.D. Mitchell), quoted *supra* note 577; 125 CONG. REC. 6375 (1979) (remarks of Rep. Drinan); cf. Gewirtz, *supra* note 464, at 62-63, 77-78 (arguing that such a standard is not unusual and can be applied by the courts for purposes of constitutional analysis and statutory interpretation). Interests specifically recognized in the Constitution, interpreted to meet the developing needs and aspirations of society, might, however, serve as an index of perceived public importance. Cf. *supra* text accompanying note 727.

<sup>760</sup> On the incorporation principle generally, see *supra* text accompanying notes 577-611; see also *supra* notes 515 & 668. To the extent the rulemakers are faithful in incorporating in Federal Rules procedural law announced in the constitutional decisions of the Supreme Court, most of the problems associated with the technique are avoided. Federal law is supreme, and the Court is the final arbiter. But the problem of changing a Federal Rule originally incorporating a constitutional decision, where change may affect the constitutional right in question, cf. *supra* text accompanying notes 606-10 (federal statutes incorporated), remains.

Finally in this aspect, it bears repeating that all of the allocation standards derived here from the pre-1934 history have to do with lawmaking choices. To the extent that a Federal Rule makes no choices or makes a choice the consequences of which are defeasible by operation of another Federal Rule, the argument for invalidity under those standards appears to be weakened considerably.<sup>761</sup> This perception, if it is accurate, may advance an inquiry into the sense of a distinction as to power between court rulemaking and adjudication in federal question cases.<sup>762</sup> At some point it may also call into question the sense of a distinction as to power between court rulemaking and adjudication in diversity cases.<sup>763</sup>

What more, then, if anything, should be done to address the widespread concern about rulemaking under the Act? As noted at the outset, most suggestions for reform have concentrated on process. In this, would-be reformers have followed, often without acknowledging it,<sup>764</sup> the path of administrative law.<sup>765</sup> Both the enduring constitutional framework of federal court rulemaking and the history of the uniform federal procedure bill indicate the aptness of the analogy.<sup>766</sup> Indeed, explicit attention to the similarities of, as well as the differences between, the two contexts may well be useful if there is to be further reform.<sup>767</sup> Undoubtedly this

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<sup>761</sup> See *supra* notes 607 & 666; *supra* note 729 and accompanying text.

<sup>762</sup> Cf. *supra* text accompanying notes 600-01 & 630-32 (incorporation of federal common law).

<sup>763</sup> Consider FED. R. Civ. P. 83, the last sentence of which provides: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." When the question is whether competing state law is to be displaced, surely a common law rule of the sort Rule 83 purports to authorize cannot be tested, or tested only, under the standards for validity under the Act set forth in *Sibbach* or *Hanna*. See *supra* text accompanying notes 57-82. Perhaps the answer is that this provision of Rule 83, indeed all of Rule 83, is invalid, because the Act authorizes only "general rules." As to local court rules, 28 U.S.C. § 2071 fills the gap (requiring, however, that the rules be consistent with Acts of Congress as well as with the Federal Rules). In any event, to the extent there is movement towards less general Federal Rules that avoid choices, see *Subrin, supra* note 410, *Hanna's* dichotomy, whatever its other defects, will demand reexamination. Cf. *Ilro Prod. Ltd. v. MusicFair Enterprises, Inc.*, 94 F.R.D. 76, 79 (S.D.N.Y. 1982) (local rule).

<sup>764</sup> But see, e.g., J. WEINSTEIN, *supra* note 3, at 92-96.

<sup>765</sup> See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); see also 1 K. DAVIS, *supra* note 453, § 3.15; Nathanson, *Separation of Powers and Administrative Law: Delegation, the Legislative Veto, and the "Independent" Agencies*, 75 NW. U.L. REV. 1064, 1075-78 (1981).

<sup>766</sup> See, e.g., *supra* text accompanying notes 452-82.

<sup>767</sup> As an obvious example, the problem of the legislative veto, which is the central concern of Professor Nathanson, *supra* note 765, is presented in 28 U.S.C. § 2076, which purports to permit either house of Congress by resolution to dis-



article will be greeted by many with the same skepticism as attempts to resuscitate the non-delegation doctrine in administrative law have been received.<sup>768</sup> But such attempts are persistent.<sup>769</sup> And in any event, they are not the only proposals to transcend process. One proposal, advanced by Professor Davis, seems of particular interest in the context of federal court rulemaking. He suggests "[s]hifting the non-delegation doctrine to a judicially-enforced requirement that administrators must do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through standards, principles, and rules, as well as to structure their power through procedural safeguards."<sup>770</sup>

To one who is not a cynic, it must be a wonder that the original Federal Rules of Civil Procedure survived challenges intact.<sup>771</sup> For acknowledging the extraordinary abilities and dedicated service of the original Advisory Committee, it appears from published and unpublished sources that the Committee proceeded without attempting to formulate a coherent and consistent view of the limitations imposed on their enterprise by the Act's procedure/substance dichotomy.<sup>772</sup> The research for this article has not revealed any evidence that there was a change in this regard in later years, although after the Court's decision in *Sibbach v. Wilson & Co.*, a change might have been thought unnecessary.<sup>773</sup>

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approve any amendment to the Federal Rules of Evidence and thereby prevent it from taking effect. See also McGowan, *Congress, Court and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1133 (1977). On the other hand, a mainstay of control of agency action, judicial review, has been impotent in connection with rulemaking under the Act. See *supra* text accompanying note 704.

<sup>768</sup> See, e.g., 1 K. DAVIS, *supra* note 453, §§ 3.1-8, 3.13; Stewart, *supra* note 765, at 1693-97.

<sup>769</sup> See, e.g., S. BARBER, *supra* note 450; Freedman, *supra* note 450; Gewirtz, *supra* note 464.

<sup>770</sup> 1 K. DAVIS, *supra* note 453, § 3.15, at 214-15. An earlier version of Davis' proposal is criticized in Gewirtz, *supra* note 464, at 53. See also S. BARBER, *supra* note 450, at 135 n.70; Stewart, *supra* note 765, at 1698-1702. Note that one basis for criticism, that Davis' approach does not "permit the courts to play their full role in checking administrative abuses," Gewirtz, *supra* note 464, at 53, is, at least historically, irrelevant in this context. See *supra* note 767. Moreover, the proposal is admittedly advanced as an alternative to the polar extremes of *Sibbach* and *Hanna* on the one hand and an attempt by Congress to prescribe detailed standards for federal court rulemaking on the other. It is the nature of compromises not to partake of theoretical purity.

<sup>771</sup> But see *supra* text accompanying note 543.

<sup>772</sup> See *supra* text accompanying notes 529-43.

<sup>773</sup> See, e.g., *supra* notes 435 & 607-08. It should be noted that the author's examination of the working papers and correspondence of the Advisory Committee was essentially confined to the papers concerning the original Federal Rules of Civil Procedure.

Now that *Sibbach* and *Hanna* have been called seriously into question, and as an alternative to new legislation attempting to define with greater precision limitations on Supreme Court rule-making,<sup>774</sup> the Judicial Conference should consider the formulation of standards or guidelines delineating the proper spheres of activity of its Rules Committees.<sup>775</sup> The Conference's Standing Committee on the Rules of Practice and Procedure is already at work on a formal statement of rulemaking procedures.<sup>776</sup> Procedural safeguards are, to be sure, a useful antidote to overreaching, and they are perhaps the most important aspect of Professor Davis' proposal. Unless there is consensus about the limits of the rule-making function, however, it is doubtful that all the procedural safeguards in the world will prevent controversy where it counts—in Congress—because the rulemakers' reaction to controversy in the lawmaking process will necessarily continue to be *ad hoc*. The costs of congressional controversy to the Supreme Court as an institution are not the only concern,<sup>777</sup> and the Court may not

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<sup>774</sup> I do not foreclose the possibility that the Court may feel called to reexamine the premises, *see, e.g., supra* note 605, or the potential, *see supra* notes 59 & 71, of these cases.

<sup>775</sup> 28 U.S.C. § 331 (1976) requires the Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law." In 1978, the Conference approved in principle "the revision of Rule 23(b)(3) . . . by direct legislative enactment, rather than by the rule-making authority, reserving for further consideration the merits of any specific statutory proposals and the appropriateness of dealing with specific aspects of such proposals through the rule-making authority." *Report of the Proceedings of the Judicial Conference of the United States* 33 (March 9 and 10, 1978).

The proposal in the text assumes no basic change in the existing rulemaking structure. It would meet a need, however, no matter what changes in structure are made, so long as Congress does not itself define limitations on rulemaking or undertake routinely and affirmatively to approve all Federal Rules, as suggested by Clinton, *supra* note 13, at 62.

The proposal would, however, permit the rulemakers to make recommendations for legislation regarding matters that have been identified as falling beyond the rulemaking power. Indeed, there is much to be said for a procedure that would permit the submission to Congress of all provisions in the area of procedure, broadly defined, that are thought to be needed, divided into two groups: those subject to congressional review and those requiring congressional approval. *See supra* text accompanying note 744; *cf. Watson, Two-Tier Law—A New Approach to Law-Making*, 27 INT'L & COMP. L.Q. 552 (1978). Professor Watson's proposal, chiefly of interest for civil law systems, nevertheless contains much that is of interest for this country. In that regard, the considerations that prompt him to suggest a different, reduced, role for his "interpretative committee" in public law matters, *id.* 566-68, are those which point to an enhanced role for the rulemakers in the area of procedure narrowly defined.

<sup>776</sup> *See supra* note 17.

<sup>777</sup> *See J. WEINSTEIN, supra* note 3, at 101-02.

remain a part of the process much longer.<sup>778</sup> In recent years, the congressional review mechanism has proved inefficient. More basically, that mechanism is an imperfect instrument for the protection of rights and interests far removed from the domain of procedural expertise.<sup>779</sup>

There are risks in such an endeavor, including primarily that it will highlight questions of institutional legitimacy that the rulemakers would prefer to submerge. To be effective, an attempt to define limits must include an opportunity for public participation, and the question will arise whether the standards or guidelines should be reviewed by the Supreme Court and also by Congress. To some extent, the answer to that question may depend on whether the existing structure continues or is replaced by one of the alternatives that has been suggested or by some other.<sup>780</sup> Under the present scheme, since it is inconceivable that limitations articulated by the Conference would violate existing interpretations of the Act, there is no strong argument for, and there may be arguments against, formal Supreme Court review prior to implementation.<sup>781</sup> In light of some of the reasons for dissatisfaction with current interpretations of the Act, congres-

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<sup>778</sup> See *supra* note 16.

<sup>779</sup> See *supra* note 747. "Even though section 2072 of title 28 provides that rules must not affect substantive rights, as a practical matter little opportunity is available for Congress to act upon a proposed rule that might infringe upon this requirement." S. REP. NO. 1406, 89th Cong., 2d Sess. 2 (1966).

Those who see in the Act's congressional review mechanism an adequate safeguard against overreaching by the rulemakers should ponder the striking inattention to § 2, and hence to that mechanism, in the pre-1934 legislative history. See *supra* text accompanying note 658; cf. Garvey, *supra* note 468, at 47 (judicial tolerance of broad delegations in the progressive era cannot be explained by notions of "agency expertise or interest group liberalism" which "belong to a later period").

<sup>780</sup> For proposals as to structural alternatives, see W. BROWN, *supra* note 14, at 77-86, 108-15. Compare with the commission suggested by Professor Lesnick, *supra* note 12, at 582-83, Chief Justice Taft's 1922 proposal, *quoted supra* text accompanying note 246.

<sup>781</sup> The arguments against Supreme Court review of standards or guidelines are variations of an argument against the Court's promulgation of Federal Rules. "The most frequent and serious argument against the role of the Supreme Court is that promulgation interferes with objective consideration of the validity of the rules in litigated cases." W. BROWN, *supra* note 14, at 75. Whether or not one agrees with that argument, see *id.* 77; Hazard, *supra* note 13, at 1289-90, the Supreme Court's decisions interpreting the Act may be thought reason enough not formally to involve the Court in the stultifying exercise of repudiating them prospectively. In addition, unless one fears that standards or guidelines approved by the Conference would go too far in the other direction, it is not clear that the speculative benefit of Court review would outweigh the speculative cost of loss of objectivity if the Court were ever to repudiate *Sibbach* and *Hanna* and a standard or guideline it had approved turned out to be insufficient to prevent overreaching.

sional review may seem desirable or even politically necessary. It is to be hoped, however, that Congress, having always the power to step in, would wait and see the results of this suggested exercise in self-regulation rather than demand formal participation.

The question for the federal rulemakers in 1982 is whether ignorance can continue to be "the best of law reformers."<sup>782</sup> This article is not a brief for a return to the notions of institutional power and competence of another age. Nor is it intended to let "fine theories or preconceived notions . . . stand in the way of the advancement of a great public reform."<sup>783</sup> Rather, it is an expression of faith that all forms of lawmaking are well served not only by procedural safeguards, but also by candor about the admittedly difficult business of defining institutional limits in a federal democracy.

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<sup>782</sup> "Ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning." O.W. HOLMES, *THE COMMON LAW* 64 (M. Howe ed. 1963).

<sup>783</sup> 1 1915 NEW YORK REPORT, *supra* note 175, at 177, *quoted supra* text accompanying note 202.